

An International Law Institution in Crisis: Rethinking Permanent Neutrality

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In this Article, Professor Havel addresses the fate of permanent neutrality, a commitment under international law to stay out of all future wars, in the transformed legal and political world after the Cold War. Professor Havel examines the new values that have become part of the international order—the end of war as an instrument of national policy, the rediscovery of collective security, and unprecedented economic interdependence. These values present a formidable challenge to the concept of permanent neutrality, which derives its meaning from the classical right of sovereign states to wage war or to stay aloof from the conflicts and survival of other nations. The Article reveals how permanent neutrality as practiced by the world's most prominently neutral states—Austria, Switzerland, Finland, Sweden, and Ireland—has proven juridically and strategically incompatible with membership of NATO, the United Nations, and the European Union. Professor Havel concludes that permanent neutrality can continue to be an expedient means of conflict prevention and containment in the post-Cold War era, provided that it is reconceptualized to break its juristic connection to the classical law of war and has the flexibility to become an institution in the service of peace.

I. INTRODUCTION

For two centuries, permanent neutrality—an international law commitment to military neutrality in all future wars¹—has been a durable model of conflict prevention and containment.² Tethered juristically and instinctually to the classical

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¹ In this Article, the legal status of military neutrality, which states adopt in the wars of other states, is called “classical” neutrality. *See infra* text accompanying note 13. “Permanent” neutrality, in contrast, is a commitment by a state that it will observe classical neutrality in all future wars between or among third states. The critical conceptual distinction between the two forms of neutrality is that classical neutrality applies only during wars, whereas permanent neutrality is a binding obligation of states *in peacetime*, which guarantees their nonparticipation in all future wars. *See infra* text accompanying note 43 (resolving the apparent conceptual paradox whereby permanently neutral states are bound in peacetime to observe classical neutrality—a body of law that only has meaning in wartime).

² *See* Surya P. Subedi, *Neutrality in a Changing World: European Neutral States and the*

laws of war and neutrality, permanent neutrality has enabled its adherent states to avoid ensnarement in the political and military quarrels of vastly more powerful neighbors. In the twentieth century, which has been dominated by two global wars and a prolonged and bitter war of nerves between antagonistic superpowers, a posture of permanent military impartiality toward rival blocs seemed to have an assured and respected place in geostrategic thinking and as an institution of international law. As the next century begins, however, the new values that are coursing through the international political order—the end of war as an instrument of national policy, the rediscovery of collective security, an unprecedented pace of economic interdependence—present a formidable jurisprudential challenge to an institution that derives its meaning from the classical polarization of war and peace and a sovereign right to wage war or to stay aloof from the wars of other states. The emerging ideologies of shared security and economic interdependence have become increasingly incompatible with an institution built on routine indifference to the conflicts and survival of other nations.³

European Community, 42 INT'L & COMP. L.Q. 238, 242 (1993) (noting durability of permanent neutrality as an institution of international law).

³ See Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. J. INT'L L. & POL'Y 83, 84 (1998) (describing tendentiously neutrality in the face of genocide as indifference, callousness, or a studied calculation of costs and benefits). Neutrality is a powerful conductor for one of international law's most enduring and roiling debates—whether its rules emanate from natural law and morality or from political expediency. For a discussion of the vitality of the debate, see Akira Iriye, *The International Order*, in THE COLUMBIA HISTORY OF THE 20TH CENTURY 229, 235 (Richard W. Bulliet ed., 1998) [hereinafter COLUMBIA HISTORY]. See also Egon Guttman, *The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907*, 14 AM. U. J. INT'L L. & POL'Y 55, 58 (1998) (describing international law as representing “the accepted moral basis” of civilized nations and the “common denominator” of morality). The forum for Guttman's moral critique of international law, a recent American University law school conference on neutrality, morality, and the Holocaust, dramatized neutrality's difficult modern position as an international legal institution subject to challenge through state practice. Thus, while we may be aware that international law is the product of many variables besides morality, including the raw power equations of competing state interests, neutrality has lately provoked polemical arguments that equate international law with a kind of secular religion. For a more measured view, see Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality, and International Law*, 14 AM. U. J. INT'L L. & POL'Y 61, 80–81 (1998) (noting the quandary of choosing “evident and accepted” standards in dealing with morally conflicted situations).

The moral attack on neutrality, as is well-known, has been intensified by recent disclosures concerning the European neutrals' continuing economic relations with the Nazi regime during World War II. On these topics, see JEAN ZIEGLER, *THE SWISS, THE GOLD, AND THE DEAD* 13, 18, 133 (1997) (asserting *de facto* integration of Switzerland into the Greater German (*Reichsdeutsch*) economic area between the defeat of France in 1940 and 1945). Ziegler's book is a blistering indictment of his country's government, and of the Swiss banking community, for providing the

This Article addresses the fate of permanent neutrality in the transformed legal and political ethos that has prevailed since the dissolution of the Soviet Union.⁴ It recognizes that the end of the Cold War accelerated a normative degeneration of the law of war and neutrality (and hence of permanent neutrality) originally set in motion by the adoption of the United Nations Charter.⁵ That degeneration—the result of the Charter’s attempt to suppress war as an aggressive instrument of state policy⁶—was masked for nearly five decades by the ideological rivalry that blocked

gold-laundering services that helped to finance the *Wehrmacht* and to give Germany access to internationally disposable foreign exchange to buy strategic raw materials. *See id.* at 48–49; *see also* Krister Wahlbäck, *Neutrality and Morality: The Swedish Experience*, 14 AM. U. J. INT’L L. & POL’Y 103, 107 (1998) (discussing *inter alia* the Swedish supply of iron ore to the German munitions industry). But, as Wahlbäck is at pains to point out, much of this economic activity was not in technical violation of the international law of neutrality. *See id.* at 107.

⁴ The Cold War, which has recently been the subject of renewed popular attention, ended with the dissolution of the Soviet Union in 1991. *See* JEREMY ISAACS & TAYLOR DOWNING, *COLD WAR: AN ILLUSTRATED HISTORY 1945–1991*, ix (1998). The Isaacs & Downing book was written to accompany a CNN television series. *See id.*

⁵ As one scholar observed in an earlier period: As long as the Community of Nations failed to develop an effective mechanism for collective security, neither the law of war nor the law of neutrality could be entirely dispensed with. *See* Werner Meng, *War*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 282, 282–90 (Rudolf Bernhardt ed., 1982).

⁶ The prohibition of the use of force in Article 2(4) of the U.N. Charter led a number of scholars unreservedly to deny the existence of war as a concept of contemporary international law. *See* Elihu Lauterpacht, *The Legal Irrelevance of the ‘State of War,’* 62 AM. SOC’Y INT’L L. PROC. 58, 58–68 (1968); Quincy Wright, *The Escalation of International Conflicts*, 9 J. CONFLICT RESOL. 434–42 (1965). However, this view overlooks the fact that the Charter itself still admits certain lawful forms of the use of force—legitimate individual or collective self-defense, and Security Council enforcement sanctions under Chapter VII. *See infra* text accompanying note 212. Indeed, Oppenheim argued that resort to “war” remains lawful in each of these instances. *See* 2 L. OPPENHEIM, *INTERNATIONAL LAW (DISPUTES, WAR AND NEUTRALITY)* § 292f, at 649–50 (H. Lauterpacht ed., 7th ed. 1952). It is certainly not *impossible*, nor is it excluded by the Charter, that the application of forcible sanctions could escalate into a war in the classical sense. *See id.* Moreover, since 1945 war has remained a recurring feature of international affairs, but has been frequently justified (as in the Falklands conflict in 1982 and the Gulf War in 1991) by reference to the Article 51 self-defense proviso. *See, e.g.*, U.N. SCOR Res. 661 (Aug. 6, 1990), in *United Nations: Security Council Resolutions Concerning Iraqi Aggression*, Aug. 6, 1990, 29 I.L.M. 1325, at 1326 (affirming inherent right of individual or collective self-defense, in response to armed attack by Iraq against Kuwait, in accordance with Article 51 of the U.N. Charter); *see also* Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT’L L.J. 249, 257 (1976). For a meditation on the historico-philosophical questions presented by the purported illegality of war, *see generally* LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 5 (2d ed. 1999).

the enforcement powers of the U.N. Security Council.⁷ In the aftermath of the Cold War, however, collective security and solidarity are becoming once again the standard for world order and are promising a permanent law of peace that states will collectively supervise within global and regional frameworks. Adding to this powerful sense of normative change in international law, intrastate conflicts such as the Kosovo emergency appear to have superseded great continental or intercontinental wars, and even regional conflicts, as the predominant form of civic upheaval.⁸

This Article does not, however, repudiate permanent neutrality as an expedient institution of international law.⁹ Instead, it calls for a reconceptualization of this well-credentialed institution in order to preserve its geostrategic appeal in an era defined by a collectively protected peace and by economic rather than ideological or military competition. While acknowledging that statecraft now requires a fundamental reassessment of permanent neutrality, the Article remains keenly focused on the inconstancy and unpredictability of international relations and the need to retain directive principles of international law that will instruct states through periods of transition and reconstruction.¹⁰ The more robust jurisprudential

⁷ See *infra* text accompanying note 222.

⁸ See *infra* text accompanying note 341.

⁹ On expediency as a primary catalyst for norms of international law, see Iriye, *supra* note 3, at 235. As discussed below, the definition of neutrality was laid down over 90 years ago in circumstances very different from those of the modern geopolitical system. See *infra* text accompanying note 13. But the reliability of a precise and unchanging system of rules cannot be lightly dismissed. Indeed, Swiss political scientist Dr. Daniel Frei proclaimed in a 1983 survey of Switzerland's permanent neutrality that "there is no real alternative" to the classical basis for neutrality:

Defined in clear and plain terms, the country's permanent neutrality rests on the *classical definition of neutrality under international law* as laid down in the 1907 [Hague Convention on the Rights and Duties of Neutral Powers and Persons in War on Land]. It is the only unambiguous legal basis on which neutrality can rest Even the advocates of [nonalignment] have, so far, not been interested in working out a definition of neutrality that could even approximate the precision of the traditional notion.

DANIEL FREI, SWISS FOREIGN POLICY 14–15 (1983) (emphasis in original).

¹⁰ The interfusion of state practice and changes in the complexion of the international law of neutrality should not be in the least surprising. State practice, after all, is one of the generative premises for international law. Already in 1941, in congressional hearings on modification of the U.S. neutrality statute, international legal scholar Charles Fenwick condemned neutrality as "a whole paradoxical system," one which "pretends that a war can go on and [that] the neutrals can stand on the sidelines and have their rights observed." Full neutrality, Fenwick maintained, was already a century out-of-date, since in an age of total war it would be impossible to maintain this

challenge, as it transpires, is not simply to substitute collective security for permanent neutrality. Rather, it is to remodel permanent neutrality as an institution that itself functions in the service of the permanent law of peace. In this way, a status of permanent neutrality will serve as an irenic (and ironic) counterpoint to the neo-Cold War mentality that focuses on, for example, an enhanced North Atlantic Treaty Organization (NATO) and the common defense and security aspirations of the European Union (EU).

The Article builds its case for reconceptualization in two discrete phases. In Parts II–IV, it exposes the incompatibility between permanent neutrality and the normative premises of the new global political order by examining the existing law of permanent neutrality, including its derivation from the classical law of war and neutrality. Part II presents the conceptual and substantive framework for the discussion. Part III sharpens the focus to the models of permanent neutrality practiced by five of the world's most prominent permanently neutral states—Austria, Switzerland, Finland, Sweden, and Ireland—all of which are located in the European theater (to borrow a resonant phrase). Part IV reveals how permanent neutrality, as manifested by these states, has proven juristically and strategically incompatible with membership of NATO and the United Nations, as well as with accession to the EU—a supranational economic syndicate that has lately begun to display pretensions of becoming a military bloc in its own right.¹¹ Finally, in the second phase of the argument, Part V synthesizes the limitations and deficiencies of permanent neutrality in the new global order and offers a reconceptualized, more politically assertive idea of a new peacetime permanent neutrality. Permanent neutrality, in this reformed setting, will sever its juristic bond with classical wartime neutrality and become explicitly an institution in the service of peace.

posture. See *Modification of Neutrality Act of 1939: Hearings on H.R.J. Res. 237 Before the Senate Comm. on Foreign Relations*, 77th Cong. 279 (1941) (statement of Professor Charles G. Fenwick, member of the Inter-American Neutrality Committee). For a discussion of the fluidity of neutrality law and policy in a changing international environment, see Franz Vranitzky (former Prime Minister of Austria), *Foreword* to *THE EUROPEAN NEUTRALS IN THE 1990S: NEW CHALLENGES AND OPPORTUNITIES* xix, xix (Hanspeter Neuhold ed., 1992) [hereinafter *EUROPEAN NEUTRALS*]. On the assertion of a dominant “legalist paradigm” in international relations, see STANLEY HOFFMANN, *WORLD DISORDERS: TROUBLED PEACE IN THE POST-COLD WAR ERA* 22 (1998).

¹¹ See Craig R. Whitney, *European Union Vows to Become Military Power*, N.Y. TIMES, June 4, 1999, at A1; see also *infra* note 331 (discussing new EU defense initiative adopted in December 1999). With the notable exception of Switzerland, all of the European neutrals discussed here are members of the EU.

II. THE JURISPRUDENTIAL LIFE OF PERMANENT NEUTRALITY: THE PARADOX OF A PEACETIME LAW OF WARTIME BEHAVIOR

A. The Wartime Idea of Classical Neutrality

Permanent neutrality cannot be explained, understood, or sensibly rethought without first conceptualizing its forebear—the institution of neutrality itself. Neutrality's long history in international law need not be recapitulated here, and only some elemental principles need to be restated and clarified before considering the more modern institution of permanent neutrality.¹² Classical wartime neutrality as crystallized in the Hague Conventions of 1907¹³ is a concept marked by

¹² By the time of Grotius in the seventeenth century, neutrality was certainly recognized in international law, though the evolution of its substantive principles, a *régime de neutralité*, was still "in its infancy." OPPENHEIM, *supra* note 6, § 287, at 625. Toward the close of the eighteenth century, U.S. foreign policy played a considerable role in raising the standard of impartiality, particularly in relation to recruitment on neutral territory. *See id.* § 291, at 631–32. Neutrality had its apotheosis in the period from 1815 to the outbreak of World War I. In 1815, the Great Powers at the Congress of Vienna acknowledged the principle of neutrality as expressed through the permanently neutral status of Switzerland. *See* REPORT OF THE FEDERAL COUNCIL TO THE FEDERAL ASSEMBLY, SWITZERLAND WITH THE UNITED NATIONS 25 (1969) [hereinafter SWISS U.N. REPORT]. It was not until the second half of the nineteenth century, however, that the principles of custom began to be crystallized in particular binding multilateral conventions.

¹³ Amidst a welter of neutrality declarations, conventions, and protocols that emerged in the nineteenth and early twentieth centuries, special mention should be made of the Hague Conventions of 1907, the product of the Second Hague Peace Conference of 1907. The Conventions embodied a concept of absolute neutrality—strict impartiality—in both land and maritime warfare. *See generally* 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 61, 109 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). The rules of neutrality in air warfare were not codified, but have been derived by analogy from land and naval combat. *But see* Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, *reprinted in* 33 AM. J. INT'L L. 175 (Supp. 1939), and the earlier Hague Draft Rules on Aerial Warfare (never adopted), *reprinted in* ROBERTS & GUELFF, *supra*, at 123–35. For an updated conspectus of the modern laws of neutrality in air combat, see GREEN, *supra* note 6, at 588–90.

As this Article demonstrates, the Hague Conventions are of vital significance to the law of neutrality (and hence to the law of permanent neutrality). Moreover, they are still in force, as numerous states have indicated. *See* Norton, *supra* note 6, at 256; *see also* DANIEL WOKER, DIE SKANDINAVISCHEN NEUTRALEN: PRINZIP UND PRAXIS DER SCHWEDISCHEN UND DER FINNISCHEN NEUTRALITÄT [THE SCANDINAVIAN NEUTRALS, PRINCIPLES AND PRACTICE OF THE NEUTRALITY OF SWEDEN AND FINLAND] 57–58 (1978) (discussing fidelity of postwar Finland to classical precepts of the Hague Convention). The United States still lists the Hague Conventions in the latest

uniformity, absoluteness, and relative simplicity.¹⁴ It is bound inseparably to the law of war,¹⁵ and has been described as a “reflex reaction to war.”¹⁶ Classical neutrality is triggered by the outbreak of war between two or more third states,¹⁷ and extinguished by the termination of that war in accordance with the methods set by custom.¹⁸ Between the points of its inception and demise, classical neutrality

edition of *Treaties in Force* (1998). Interestingly, given this Article’s attempt to remodel permanent neutrality for an age of peace, the Hague conferences of 1899 and 1907, despite their military provenance, are now viewed by some historians as marking “the genesis of modern pacifism.” Robert L. O’Connell, *War: Institution Without Portfolio*, in COLUMBIA HISTORY, *supra* note 3, at 248, 248–49.

¹⁴ The inflexible and uniform rules of classical neutrality, precisely because they seek to regulate the conduct of neutral states in many diverse geopolitical conditions, express a minimal content of normative supervision, and grant broad latitude to the domain of interstate political relations. See HANS SCHMITT, *DIE RECHTSGRUNDLAGEN DER NEUTRALISATION VON STAATEN* [THE LEGAL FOUNDATIONS FOR THE NEUTRALIZATION OF STATES] 55 (1970). Political expediency, the strategic interplay of military powers, changing techniques of warfare, and economic priorities have all played a role in evolving the compromise character of neutrality law. Moreover, because historically the greatest and strongest powers have been responsible for campaigns of war, while smaller and weaker states have striven for neutrality, the law of neutrality has been sociologically predisposed to accommodate the interests of the powerful belligerents and to restrict the freedom of action of the neutrals. See Hanspeter Neuhold, *The European Neutrals Facing the Challenges of the 1990s*, in EUROPEAN NEUTRALS, *supra* note 10, at 231, 241.

¹⁵ Hence, it is sometimes referred to as “the neutrality of war.” Yoshitaro Hirano, Address Before the International Association of Democratic Lawyers (Oct. 1960), in LEGAL ASPECTS OF NEUTRALITY: PROCEEDINGS OF THE THIRD COMMISSION, 1960, at 9 [hereinafter LEGAL ASPECTS OF NEUTRALITY].

¹⁶ MICHAEL SCHWEITZER, *DAUERNDE NEUTRALITÄT UND EUROPÄISCHE INTEGRATION* [PERMANENT NEUTRALITY AND EUROPEAN INTEGRATION] 6 (1977); see also JOSEF L. KUNZ, *KRIEGSRECHT UND NEUTRALITÄTSRECHT* [THE LAW OF WAR AND THE LAW OF NEUTRALITY] 203 (1935); OPPENHEIM, *supra* note 6, § 285, at 624; 2 JOHN WESTLAKE, *INTERNATIONAL LAW* 161 (1907).

¹⁷ Conceptually, neutrality is the legal situation that ensues when a state (the neutral state), as a subject of international law, exercises its sovereign right of self-determination in matters of war and peace and treats a war which was broken out between third states (the belligerents) as a *res inter adios gesta*, opting for a posture of nonparticipation in that war. See Waldemar Hummer, *Völkerrechtliche Fragen der Neutralität und der Neutralitätspolitik* [International Law Questions of Neutrality and Neutrality Policy], in DIE NEUTRALEN IN DER EUROPÄISCHEN INTEGRATION: KONTOVERSEN, KONFRONTATIONEN, ALTERNATIVEN [THE NEUTRALS IN EUROPEAN INTEGRATION: CONTROVERSIES, CONFRONTATIONS, ALTERNATIVES] 3, 5 (Hans Mayrzedt & Hans Christoph Binswanger eds., 1970).

¹⁸ Termination is not regulated in any multilateral convention, but customary international law recognizes at least three procedures for termination of a war: (1) the conclusion of a peace treaty (usually preceded by an armistice), see Meng, *supra* note 5, at 288–90, (2) the cessation of hostilities (if accompanied by an intention that the state of war should cease), see generally Sydney

imposes duties and confers rights on both belligerent and neutral states. Some of those duties and rights are regulated by custom,¹⁹ some (which originated as custom) have been codified in multilateral legal instruments.²⁰

1. *Four Key Wartime Obligations*

The wartime duties of neutrals can be compressed into a brief taxonomy. The cynosure of these obligations is the duty of nonparticipation as a belligerent. This is a principle of customary international law and is not explicitly implanted in any of the multilateral conventions that regulate neutrality.²¹ This transcendent duty of

D. Bailey, *Cease Fires, Truces, and Armistices in the Practice of the U.N. Security Council*, 71 AM. J. INT'L L. 461 (1977), and the extinction of a belligerent (*debellatio*), see 2 D.P. O'CONNELL, INTERNATIONAL LAW 441-42 (1970); see also J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 606 (1977). The demise of a status of classical neutrality would also follow the assumption by either a belligerent or neutral state of an active belligerency toward the other. See OPPENHEIM, *supra* note 6, § 312, at 671; Norton, *supra* note 6, at 250.

¹⁹ The entire law of contraband, for example. See *infra* note 37 and accompanying text.

²⁰ See *supra* note 13 (discussing Hague Conventions). Here, I am setting aside the difficulty presented by the definition of war, which is compounded in modern international law by its supposed unlawfulness—"supposed" in the sense that the long series of efforts since 1919 to outlaw war have not been reflected in state practice. See Meng, *supra* note 5, at 285. State practice has shown little enthusiasm for a definitional stabilizing of the concept of war. This reluctance has been caused by a self-interested awareness that the absence of an international law norm of war enhances the potential legality of measures short of war, intermediate hostile measures such as blockade, intervention, or even preventive self-defense. Declarations of war, accordingly, have become rare, and the juristic vocabulary is dominated by the rhetoric of self-defense, reprisal, and humanitarian intervention. See Hanspeter Neuhold, *Permanent Neutrality and Non-Alignment, in THE AUSTRIAN SOLUTION: INTERNATIONAL CONFLICT AND COOPERATION* 161, 187 (Robert A. Bauer ed., 1982) [hereinafter THE AUSTRIAN SOLUTION]. Some theorists have continued to seek a uniform definition of war and base their efforts exclusively on historico-sociological criteria. See Myres S. McDougal & Florentino P. Feliciano, *The Initiation of Coercion, A Multi-temporal Analysis*, 52 AM. J. INT'L L. 241 (1958) (representing the American realist school). Other theorists pursue a neo-Kelsenian abstraction that will "purify" the law of war of exactly those supposedly contaminating sociological phenomena. See generally JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR LAW liii (1959) (criticizing Kelsen for exorcising "the world of existence").

²¹ According to Schweitzer, "it flows directly from the concept of neutrality in general international law." SCHWEITZER, *supra* note 16, at 98. There is, however, a fundamental difference in the intensity of this duty as it applies to ordinary neutral powers and permanently neutral states. Ordinary neutrals can abandon their neutrality, either by choosing one of its inferior derivatives (benevolent or qualified neutrality, or nonbelligerency), or by entering the war as a full participant. For the permanently neutral state the option of abandonment is foreclosed *ab initio* by the assumption of the status of permanent neutrality. The duty of future neutrality "excludes for the

nonparticipation generates three further collateral duties that constrain the neutral's wartime behavior in order to keep it outside war. Under the duty of abstention, a neutral state, which by definition cannot take part in a war, is forbidden to give to a belligerent power, directly or indirectly, any military assistance that would be of service in the conduct of a war, including the supply of troop contingents or the export of war materials.²² Although this duty is absolute in its application to the neutral government, private arms merchants successfully lobbied the drafters of the Hague Conventions to exempt them from its reach.²³ The duty of impartiality

permanently neutral state the possibility of a choice between war and neutrality." ANTON GREBER, *DIE DAUERNE NEUTRALITÄT UND DAS KOLLEKTIVE SICHERHEIT-SYSTEM DER VEREINigten NATIONEN* [PERMANENT NEUTRALITY AND THE COLLECTIVE SECURITY SYSTEM OF THE UNITED NATIONS] 41 (1967); *see also* KARL STRUPP, *NEUTRALISATION, BEFRIEDUNG, ENTMITILARISIERUNG* [NEUTRALIZATION, PACIFICATION, DEMILITARIZATION] 207 (1933). But this posture is always subject to the right of the permanently neutral state to its own self-preservation, which is a right inuring to *any* state which adopts neutrality in wartime. *See* GREBER, *supra*, at 30.

²² Article 6 of Hague Convention XIII prohibits "[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent power, of war-ships, ammunition, or war material of any kind whatever . . ." ROBERTS & GUELFF, *supra* note 13, at 111. Custom supplements this rule of abstention with a prohibition on the grant of credit to a belligerent or the placing of finance at its disposal for use in waging war. *See* Neuhold, *supra* note 20, at 162; *see also* OPPENHEIM, *supra* note 6, § 351, at 743; ALFRED VERDROSS, *VÖLKERRECHT* [INTERNATIONAL LAW] 484 (1964). This prohibition is nevertheless implicit in the word "indirectly" in the text of Article 6. Rotter, advocating strict compliance with the classical code, ruled out violating the duty of abstention even for humanitarian purposes (as when Sweden dispatched volunteers to Finland to aid in the Winter War against the Soviet Union in 1939). *See* MANFRED ROTTER, *DIE DAUERNE NEUTRALITÄT* [PERMANENT NEUTRALITY] 248 (1981).

²³ "A 'two-faced' form of neutrality consequently developed, making it possible for wars to be prolonged through supplies from 'neutral persons.'" Gyula Hajdu, Address Before the International Association of Trial Lawyers (Oct. 1960), in *LEGAL ASPECTS OF NEUTRALITY*, *supra* note 15, at 101, 103. Capitulation to the interests of private armaments manufacturers was more easily possible in the age of economic liberalism. *See* ALFRED VERDROSS, *THE PERMANENT NEUTRALITY OF AUSTRIA* 42 (1978). The result was the almost identical Article 7 in Conventions V and XIII: "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or fleet." ROBERTS & GUELFF, *supra* note 13, at 64. Both Conventions, as noted in the main text, apply an important qualification to this concession, namely, the principle of impartiality. *See infra* note 24 (discussing application of principle of impartiality). What the Conventions did not anticipate, however, was the later emergence of the state itself as an economic actor in the armaments industry and the inevitable conflict between Article 6 of Convention XIII and Article 7 of Conventions V and XIII. Could a state, acting through state-owned enterprises, circumvent the absolute prohibition of Article 6? Zemanek considered the problem as one of the international law of state responsibility, affixing liability for breaches of Article 6 only to decisions to grant military assistance which were indisputably acts of state sovereignty. The award of an export permit to a state-owned enterprise would not therefore be a violation of Article 6 unless the

requires neutral powers in wartime to apply the rules of neutrality, where relevant, equally and without discrimination to all belligerents.²⁴ Impartiality can only have meaning outside the catalogue of acts expressly or impliedly prohibited to neutral states, so that the supply of war materials by a state *qua* state would not be lawful even if strictly applied in equal measure to both belligerents.²⁵ Finally, the duty of

transactions concerned were initiated at the governmental level, for example by meetings of defense ministers of the neutral and belligerent states. See Karl Zemanek, *Wirtschaftliche Neutralität* [Economic Neutrality], 81 JURISTISCHE BLÄTTER [JURISPRUDENTIAL PAPERS] 249, 250 (1959). Zemanek's proposal would obviously require close scrutiny of each individual case, testing for the presence of a bad faith scheme such as advance sale by the state of weapons to a private dealer, who is then granted a license to trade with the belligerents. In fact, this very strategem was adopted by the U.S. Department of the Navy in World War II to supply military aid to the British and French Governments in the aftermath of the Dunkirk evacuation. See 11 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 415 (1963).

²⁴ See Neuhold, *supra* note 20, at 162–63; see also OPPENHEIM, *supra* note 6, § 294, at 654 (noting that, “[s]ince neutrality is an attitude of impartiality, it excludes such assistance and succo[u]r to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other”); SCHWEITZER, *supra* note 16, at 98–99; VERDROSS, *supra* note 22, at 493. The duty of impartiality is encoded as a general principle in the Preamble to Hague Convention XIII: “[I]t is, for neutral powers, an admitted duty to apply these rules impartially to the several belligerents.” ROBERTS & GUELFF, *supra* note 13, at 110. It appears also in a more specific context in Article 9 of both Conventions V and XIII, *inter alia* governing restrictions placed on the private export or transport of war materials and use of private telecommunications installations and on admission into neutral territorial waters and ports of belligerent war-ships or their prizes. *Id.* at 64 (Convention V) and 111–12 (Convention XIII). These international treaty rules in effect state what is a precept of customary international law, *aequalitas amicitiae*. See Edgar Bonjour, *Österreichische und schweizerische Neutralität* [Austrian and Swiss Neutrality], 60 SCHWEIZER MONATSHFTE [SWISS MONTHLY MAGAZINE] 829, 832 (1980). Thus, if the neutral power chooses to ease the 24-hour stop/transit rule for belligerent war-ships set forth in Article 12 of Hague Convention XIII, that concession must be granted on precisely equal terms to all belligerents. For the text of Article 12, see ROBERTS & GUELFF, *supra* note 13, at 112.

²⁵ See DENISE ROBERT, *ÉTUDE SUR LA NEUTRALITÉ SUISSE* [A STUDY OF SWISS NEUTRALITY] 75 (1950). Thus, the illegal sale by an Austrian state firm of millions of dollars worth of weapons to Iran during the Gulf War—contravening a law that forbade all private and public arms exports to theaters of war—might have been construed as a violation of neutrality, and was indeed prosecuted as such in the Austrian courts. See *infra* text accompanying note 151 (discussing Austrian law on arms exports); see also Michael Wise, *Austrians Get Partisan About Their Neutral Status*, INDEPENDENT (London), June 20, 1990, at 10. Nevertheless, Iran was not technically a belligerent, and the Gulf War was not a declared war in a technical sense.

If private trade in arms is permitted, therefore, an arithmetical equality is not required in international law. The required principle is that of formal equality, by which the neutral state must apply the same legal provisions (whether a general license to export or a general prohibition from doing so) to trade with all belligerents. See ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 454 (1954) (noting that, in the field of foreign trade, “it is sufficient that prohibitions

prevention—the only duty that disturbs the fundamental passivity of a neutral status—requires neutral states to resist, with the means at their disposal, the conversion of their territory into a base of operations for the belligerents,²⁶ whether indirectly, by the grant or taking of rights of passage (the transit of troops or war

and restrictions are brought into force (or are removed) simultaneously with respect to both belligerent sides”). Nevertheless, this principle cannot take account of *material* imbalances among belligerents, whose capacity needs and purchasing power, as well as pre-war relations with the neutral state’s arms industry, will inevitably be different. These differences, despite a formal legal equality among the belligerents, may lead to undesirable consequences from the perspective of a credible neutrality policy. See *infra* text accompanying note 41 (discussing management of economic relations with belligerents).

²⁶ Should the neutral state prove, at least over a certain period of time, unable or unwilling to put an end to unlawful encroachments on its neutrality, the belligerent affected by them is entitled to do so itself in reliance on its right of self-help—subject, at least for member states of the United Nations, to Article 2(3) of the U.N. Charter which requires all members “to settle their international disputes by peaceful means,” and also to the need to evaluate self-help involving the use of force in the light of Article 2(4) of the Charter. See *supra* note 6 and accompanying text (discussing use of force under the U.N. Charter). The Damocles sword of an affected belligerent’s right of self-help makes compliance with the obligation of prevention in the neutral’s own national interest. A neutral’s use of force to repel an attempted violation of its territory cannot, under Article 10 of Hague Convention V, be regarded as a “hostile act.” ROBERTS & GUELF, *supra* note 13, at 64. The Convention therefore foresees situations where the most appropriate mode of repulsion will be armed resistance. In accordance, however, with the doctrine of proportionality in international law, the neutral’s response should never be excessive in relation to the violation suffered. See D.W. GREIG, *INTERNATIONAL LAW* 886–87 (1976) (noting that legitimate self-defense may include targeted, smaller-scale strikes such as hampering future attacks by destroying supply dumps, bases, or training camps used by personnel participating in raids). A diplomatic protest may well suffice in a case of insignificant airspace infringement. Switzerland experienced over five thousand violations of its airspace in World War II. See VERDROSS, *supra* note 23, at 42. Deployment of the means at the neutral’s disposal—*ultra posse nemo tenetur*—in conformity with the rule of proportionality, will preclude the commission of an international law delict by the neutral. See Gustav Däniker, *Swiss Security Policy in a Changing Strategic Environment*, in *EUROPEAN NEUTRALS*, *supra* note 10, at 3, 6. The diplomatic protest is absolutely the minimum response that a neutral power is expected to make. As for aircraft armed with nuclear warheads, recent literature has argued that the duty of repulsion, the duty in this case to prevent or bring an end to overflight, could threaten the very existence of the neutral, and failure to intercept overflying missiles could not therefore constitute a breach of the neutral’s international law duties. See Däniker, *supra*, at 6 (citing *ultra posse nemo tenetur* in the context of overflight by guided missiles); see also DIETER KOCH, *DAS IMMERWÄHREND NEUTRALE ÖSTERREICH UND SEIN VERHÄLTNIS ZU DEN INTERNATIONALEN ORGANISATIONEN* [PERMANENTLY NEUTRAL AUSTRIA AND ITS RELATIONSHIP TO THE INTERNATIONAL ORGANIZATIONS] 83 (1966); Kevin J. Madders, *Neutrality in Air Warfare*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 14, 15.

materials, for example), or directly, by the establishment on the territory of communications facilities or recruitment agencies.²⁷

The *Conception officielle suisse de la neutralité*, the Swiss government's official charter of neutrality, requires—as an additional duty—that a neutral country must not surrender or transfer any of its sovereign rights to a belligerent.²⁸ Assertion

²⁷ See ROBERT, *supra* note 25, at 75; see also KUNZ, *supra* note 16, at 226–27. Article 1 of Hague Convention V provides that “[t]he territory of neutral Powers is inviolable.” ROBERTS & GUELFF, *supra* note 13, at 63. Article 1 thereby creates a *right* of neutral states to have their sovereign territory respected by belligerent powers. It should neither be pressed into service as a theater of war, nor should it be used as a base of support for wars taking place outside its borders. See GREBER, *supra* note 21, at 23; see also VERDROSS, *INTERNATIONAL LAW*, *supra* note 22, at 403. Not only can a neutral power not waive its right to territorial inviolability, it has a concomitant duty to prevent its sovereign territory from being dragged directly or indirectly into the war. This duty springs from the interaction of Articles 2, 3, and 4 of Hague Convention V, listing specific acts which, if attempted by belligerent powers, would constitute an impermissible violation of neutral territory, and Article 5, imposing on the neutral state an obligation to “not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.” ROBERTS & GUELFF, *supra* note 13, at 63. Therefore, under these combined provisions, the following acts are prohibited to belligerents on neutral territory, and the neutral state is required to prevent their occurrence:

(1) the passage through neutral territory of convoys of troops, munitions of war, or supplies [Article 2]. Convoys of sick or wounded belonging to the belligerent armies are excepted [Article 14];

(2) the establishment of new, or the use of existing (other than public) communication centers for the purpose of a connection with the belligerent countries or their forces [Article 3]. A neutral Power is not, on the other hand, obliged to forbid or restrict the use by belligerents of communication centers owned by the neutral or by private enterprise and which are open for general public use [Article 8];

(3) the formation of corps of combatants or the opening of recruiting agencies on the territory of the neutral Power to assist the belligerents [Article 4].

See *id.* at 63–65. The historical insecurity of neutral powers in naval warfare is reflected in the right of passage through neutral waters (and limited right to remain in neutral ports) granted to belligerent warships under Hague Convention XIII. ROBERTS & GUELFF, *supra* note 13, at 109. The primary rule in air warfare is that neutral airspace is inviolable, and it was established by the consistent World War I practice of neutrals. See Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT’L L. 559, 559–60 (1953). Thus, the neutrals rejected any extension of the diluted code of sea warfare to the air and preferred the wider rights of sovereignty derived from land war. According to general international law, the airspace is part of the sovereign territory of the state lying beneath it. See BRIAN F. HAVEL, *IN SEARCH OF OPEN SKIES: LAW AND POLICY FOR A NEW ERA IN INTERNATIONAL AVIATION* 31 (1997) (discussing the embodiment of this principle in the Paris Convention of 1919 and thereafter).

²⁸ For the text of the *Conception*, I have consulted the English translation provided in VERDROSS, *PERMANENT NEUTRALITY*, *supra* note 23, at 36–40. Verdross’s study, which first appeared in 1958, has itself become the official *vade mecum* on the rights and obligations of

of this further duty may be pleonastic, however, since it appears that all cessions of sovereignty rights which might contravene the law of classical neutrality must be excluded by the four duties mentioned. The grant of a right of transit across neutral territory to a belligerent army, for example, potentially infringes the duties of nonparticipation, abstention, impartiality, and prevention, and is also an impermissible, if temporary, cession of a particular sovereign right.²⁹

Austrian permanent neutrality.

²⁹ The Hague Conventions of 1907, *see supra* note 13, acknowledged only one species of neutrality, that of classical neutrality, which has been described as strict, absolute, or integral neutrality when contrasted with relativist variations such as benevolent neutrality and nonbelligerence. *See* OPPENHEIM, *supra* note 6, § 305, at 663. A neutral in wartime is inevitably subject to stresses and shocks that may cause it to recalibrate its stance of impartiality—if not ultimately to jettison its primary goal of nonparticipation—in the heat of conflict. *See* Bennett Freeman, *United States and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II*, 14 AM. U. J. INT'L L. & POL'Y 137, 138 (noting absence in World War II of any one specific form of neutrality, "perfect" or otherwise). Neutrality, after all, is not *jus cogens* as set forth in Article 53 of the Vienna Convention on the Law of Treaties. *See generally* GREIG, *supra* note 26, at 471–74 (discussing *jus cogens* and the Vienna Convention). It can be derogated from, and sometimes public international law has nominalized and categorized these derogations as components of a more broadly conceived law of neutrality. *See* SCHWEITZER, *supra* note 16, at 11. Benevolent neutrality applies whenever a state, to preserve its status of neutrality, unilaterally supports a party to a war. Sweden's "benevolence" during World War II oscillated between both belligerent alliances according to the fortunes of the war. *See* RODERICK OGLEY, *THE THEORY AND PRACTICE OF NEUTRALITY IN THE TWENTIETH CENTURY* 153–72 (1970). To allow a benevolent neutrality, of course, opens a Pandora's box of variant nomenclatures. Qualified neutrality refers to the status of benevolent neutrality guaranteed by a previous international law treaty. *See* SCHWEITZER, *supra* note 16, at 18. It has been applied to the relationship of neutrals to their fellow members of the United Nations. *See id.* at 21; *see also* OPPENHEIM, *supra* note 6, § 292e, at 648. The literature is sprinkled with references to differential, flexible, discriminatory, differentiating, limited, relative, imperfect, incomplete, or "demi-" neutrality. *See id.* Nonbelligerency is positioned even more distantly from the pure concept of classical neutrality in that (unlike benevolent neutrality) it pretends no status of impartiality, ready to be shaded off into degrees of partiality toward one side or the other, or toward both, depending on the course of the conflict. *See generally* Edwin Borchard, *War, Neutrality, and Non-Belligerency*, 35 AM. J. INT'L L. 618 (1941) (analyzing nonbelligerency); Robert R. Wilson, 'Non-Belligerency' in Relation to the Terminology of Neutrality, 35 AM. J. INT'L L. 121 (1941) (analyzing nonbelligerency). Nonbelligerency describes the posture of a state which on the one hand renounces any impartiality from the outset and guarantees to one of the belligerents all political, military, and economic advantages (propagandistic support, economic and financial aid, war material, access to bases, etc.), but at the same time it avoids the legal status of cobelligerent and seeks to retain all the advantages of the law of classical neutrality (i.e., its rights, especially those that involve neutral trade). *See* SCHWEITZER, *supra* note 16, at 22; VERDROSS, *supra* note 22, at 505; Neuhold, *Permanent Neutrality*, *supra* note 20, at 162, 195. Nonbelligerency proved an unstable posture during World War II. While some states (Spain and Portugal, for instance)

2. No Obligation of Economic (or Ideological) Neutrality

There is a mistaken impression, compounded by new information about the depth of Swiss and Swedish engagement with the Nazi war economy, that classical neutrality also entails (or *should* entail) strict economic neutrality.³⁰ Somewhat incongruously, in fact, a “total” neutrality, encompassing military, economic, and even ideological impartiality, was a tenet of Nazi jurisprudential theory, but was never part of the classical law of neutrality.³¹ As the foregoing conspectus of duties makes clear, classical neutrality has always been a strategy of strictly military origin and consequences.³² If a third Hague conference were convened today to refurbish neutrality’s tenets for a post-Cold War age,³³ it might consider whether an economic

withdrew more and more into classical neutrality, others (the United States, the states of Central and South America) were increasingly sucked into the conflict. *See generally* Rudolf L. Bindschedler, *Neutrality, Concept and General Rules*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 9, 12 (discussing the pattern of neutral behavior in World War II).

³⁰ Thus, Hanspeter Neuhold claimed—wrongly, in my view—that if a neutral plans an embargo on an agricultural product, it must apply the embargo equally to all belligerent parties. *See* Neuhold, *supra* note 20, at 163. If a state were to adopt such a principle of formal equality, it would be as a component of its neutrality policy and not because of any international law obligation. Whether Neuhold might ultimately be justified in his assertion, of course, would depend on the range of products legally considered to be of use in a war. *See infra* text accompanying note 37 (discussing conceptual scope of *matériel de guerre*).

³¹ The German Nazi jurist, Wilhelm Grewe, writing in 1940, advocated the concept of *die totale Neutralität* [total neutrality], a seamless neutrality embracing military, economic, and ideological impartiality, and the logical derivative, in Grewe’s analysis, of the Nazi doctrine of *Totalität des Krieges* [total war]. *See* Wilhelm G. Grewe, *Wirtschaftliche Neutralität* [*Economic Neutrality*], in 7 *ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT* [JOURNAL OF THE ACADEMY FOR GERMAN LAW] 141 (1940).

³² *See* Guttman, *supra* note 3, at 55. Guttman faulted the drafters of the Hague Conventions for ignoring not only the effects of economic assistance (for example, the governmental interest in the export of intellectual property involved in the manufacture of weaponry), but also implicated questions of morality—notably the acceptance by neutral banks of assets obtained in violation of international humanitarian precepts. *See id.* at 55–56 (considering the moral status of neutrality). Guttman would not permit a state to adopt neutrality—and it scarcely matters for his argument whether neutrality is military, economic, or both—whenever “the maintenance of commercial and financial relations with a regime [is] conceded to be evil under the moral precepts of countries claiming a ‘neutral’ status.” *Id.* at 57. As noted below, however, classical neutrality has never denied the possibility of ideological opposition directed against one of the belligerents, making it subject only to the general obligation of nonparticipation. *See infra* note 42 and accompanying text (discussing ideological neutrality).

³³ On the agenda for a third Hague Conference, see GREEN, *supra* note 6, at 29.

neutrality should also form part of the legal doxology professed by neutral states³⁴ (and whether, at the most notorious intersection of military and economic support, all arms sales by neutrals to belligerents, including sales by private parties, should be prohibited).³⁵ After all, materials, including technology, have been acquiring a proportionately greater importance in the pattern of hostilities than mere troop size. Moving beyond the consistent military focus of the Hague Conventions, which refer to the concepts of “arms, munitions of war, or, in general . . . anything which could be of use to an army or fleet,”³⁶ it is obvious that most goods—especially food products—can be useful in some way to the conduct of a war.³⁷ In that sense, as Greber has argued, “every economic exchange by a neutral with a belligerent is characterized as a definite act of war assistance.”³⁸

³⁴ See ROBERT, *supra* note 25, at 74 (discussing the prominence of military issues at the Second Hague Peace Conference).

³⁵ See Vagts, *supra* note 3, at 93.

³⁶ See Common Article 7 of Hague Conventions V and XIII, *reprinted in* ROBERTS & GUELFF, *supra* note 13, at 64, 111.

³⁷ Modern warfare and the extensive requirements of armed forces make such a wide variety of articles seem useful in the sense in which that term is employed in Hague Conventions V and XIII, that a broadly-based definition of military goods would intolerably restrict trading by neutral powers. Moreover, a broad definition of war material would imply too extensive an interference with private trade because it would, in practice, expose all neutral private trade to defensive measures by belligerents under prize law and in the economic realm. See generally D.H.N. Johnson, *Prize Law*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 154–59 (explaining prize law as the wartime capture of ships and cargo by belligerent powers). State practice has shown the desire of belligerent powers to bring as many commodities as possible within the ambit of military goods or war material. The most far-reaching contraband lists, for example, were declared by the belligerent states in World War II. The lists included arms, ammunition, explosives, chemicals, fuel, means of transportation, all tools and machine tools, all means of communication including even paper, and finally coin, bullion, currency, and promissory notes. See VERDROSS, *supra* note 22, at 499. By the end of the war, virtually all goods, with the exception of *objets d'art* and luxury items, were on the lists. See *id.* Such lists are only of empirical value, however, and do not bear directly on the legal scope of the concept of military goods. This characterization demands objective criteria, especially if neutrals are to be conceded their right to carry on peaceful trade with belligerents. Zemanek classified as military those articles which “in their essence” are useable exclusively or predominantly for military purposes. See Zemanek, *supra* note 23, at 249. Thus, things of daily necessity, such as foodstuffs, could not attract this designation. “To be classified as war materials are those goods which by their nature are intended exclusively or predominantly for military purposes, but not foodstuffs and other things of daily necessity, that are intended for the population, even though they could also serve military purposes.” *Id.*

³⁸ GREBER, *supra* note 21, at 26–27. As Robert expressed it, “[e]very economic relation of the neutral state with the belligerents is thus ultimately a material aid, a more or less direct taking of sides in the course of operations. There are no longer any indifferent economic exchanges.”

During the two World Wars, while individual neutral countries, in their own interest and without compulsion of international law, either forbade entirely or placed under rigid controls the export of nonwar materials, Switzerland, in order not to be deprived of all foreign trade, practiced a restriction of its economic activity called the *courant normal*.³⁹ According to this self-adopted yardstick, the average traffic in goods with belligerents during the three year period prior to the outbreak of war was taken as the gauge for continued trade in wartime, so far as the belligerents were in a position to maintain that quota.⁴⁰

The neutral's discretion in ordering its economic relations with belligerents must at some point be limited by the primary function of the law of neutrality itself, which is to keep the neutral out of the wars of other states.⁴¹ A similar cautionary

ROBERT, *supra* note 25, at 78. While this view would buttress Guttman's argument that morality must eventually trump neutrality, *see supra* note 32, publicists have accepted that the principle of abstention from military assistance cannot be of relevance because this would naturally lead to the preclusion of all economic exchange between neutral and belligerent (where the neutral state itself is an economic actor), given that virtually all goods can have significance for a sustained war campaign. *See GREBER, supra* note 21, at 26-27 (remarking that no product is completely useless militarily in a context of "total war"). Some writers, echoing Nazi juristic theory, have even portrayed the rule of impartiality as one of custom, and accordingly applicable to all areas, economic and even ideological. This kind of dogmatic universalism was also reflected in modern Communist theory. *See CASTRÉN, supra* note 25, at 453; KOCH, *supra* note 26, at 83.

³⁹ *See VERDROSS, supra* note 23, at 39.

⁴⁰ *See ROBERT, supra* note 25, at 79. Trade was conducted, incidentally, on a strictly noncredit basis. *See id.* The *courant normal* was the expression of a national neutrality policy decision, which proved congenial to Swiss security interests in certain situations, but was not a legal duty and still today reflects no legal duty. This view is also taken in the *Conception officielle suisse*. *See VERDROSS, supra* note 23, at 39. *But see supra* note 3 (mentioning recent controversy concerning Swiss partiality toward the Axis economies during World War II).

⁴¹ Accordingly, the rule that would allow the limits of a neutral's wartime economic flexibility to be established is the general duty not to participate as a belligerent in the war and the specific obligation of abstention. *See generally* Thomas Oppermann, *Intervention*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 233, 233-36 (Rudolf Bernhardt ed., 1982) (discussing reach of rules of abstention for neutral states). If the unilateral economic favor of a belligerent by a neutral state assumes such a proportion that it is tantamount to an "intervention" in the war on the side of that belligerent, an infringement of the law of classical neutrality can surely be asserted. *See id.* at 233 (describing intervention as interference with the external or internal affairs of another state in order to induce a certain behavior of the latter, using coercion and violation of sovereign will). The difficulty is to determine with some degree of objectivity the level of unilateral discrimination that would constitute an unlawful intervention. Oppermann warned that it is "especially difficult to draw the line between legitimate pursuance of a nation's own economic interests and inadmissible pressure." *Id.* at 235. Attempts by modern international law to outlaw war and the use of force have contributed to great uncertainty in classifying forms of pressure that continue to be exercised by states, but do not unambiguously amount to *vis absoluta* or massive

restriction could be argued in terms of ideological engagement in third state conflicts, which is also not forbidden to neutral states under classical law.⁴²

B. *The Paradox of Permanent Neutrality in Peacetime*

1. *The Paradox and a Resolution*

Permanent neutrality is the international law status of a state which is obligated prospectively to maintain classical neutrality in the wars of other states, and not to take part in the wars of other states, irrespective of the identity of the belligerents or the geographical proximity of the conflict.⁴³ Given classical neutrality's intense

coercion by the use or threat of force (intervention properly so-called). *See supra* note 20.

⁴² Greber has emphasized that, because the law of peace continues to govern neutral/belligerent relations to the extent not otherwise determined by the law of neutrality, the general international law precept of respect for the prestige and dignity of foreign states must continue to apply, thereby limiting free expression of opinion by the neutral power. *See GREBER, supra* note 21, at 31. It is true that the German argument of the National Socialist era prompted the Swiss—always in the vanguard of protective measures for neutrality—to clamp restrictions on their press during the Nazi ascendancy, but they had also done so during World War I, and always as an expression of neutrality “policy” rather than from a sense of legal obligation. *See Edgar Bonjour, Swiss Neutrality During Two World Wars, in MODERN SWITZERLAND* 419, 436 (1978). Perhaps the most bizarre example of a punctilious moral neutrality from World War II is the still-controversial gesture of the Irish Prime Minister, Éamon de Valera, in paying a formal visit to the German legation in Dublin on April 30, 1945, to express his condolences on the death of the Führer, Adolf Hitler. On the death of Roosevelt, just 18 days previously, de Valera had sent a message to President Truman, mourning “a great man and a noble leader,” and therefore, in Robert Fisk’s view, the German legation visit “would naturally have suggested itself to a man who applied so public—indeed, so balanced—a rigidity to the principles of neutrality.” ROBERT FISK, *IN TIME OF WAR: IRELAND, ULSTER AND THE PRICE OF NEUTRALITY 1939–1945*, at 461 (1983). But the Prime Minister’s conspicuous act of neutrality was also “extraordinary and shocking,” Fisk wrote, “because the German extermination camps had now been discovered by the advancing Allied armies and the truth of the Nazi policy of genocide had just been revealed to the world.” *Id.*

⁴³ The law of neutrality has had its learned exponents from the time of Grotius, while the last hundred years have seen the emergence of a substantial corpus of juristic study concerning the institution of permanent neutrality. The adoption of permanent neutrality by Austria in 1955 and Laos in 1962, together with the need to re-evaluate the concept of neutrality in the era of the United Nations and a nuclear overkill capacity, have combined to sustain academic interest in permanent neutrality since 1945. *See Subedi, note 2*, at 249. It is a body of legal scholarship that is written chiefly by German, Austrian, Swiss, and Scandinavian jurists, and published almost exclusively in the French and German languages. Apparently, the jurisprudence of permanent neutrality has not sufficiently captured the common law legal imagination to warrant more than the very shortest translation exercises. The predominance of French and German writing is unsurprising in the context of the present Article, since only one of the five European neutrals examined here, the

normative and intuitive attachment to the law of war, however, the purported adoption of a stance of neutrality *in peacetime* would seem to be conceptually incongruous. As shown above, the condition precedent for classical neutrality is the existence of an armed conflict that can be qualified in international law as a war involving two or more third states. If a state were to declare its intention to observe a temporally-unconfined classical neutrality, that intention could not be governed by the public international law of neutrality, because the object to which the declaration of the state's will is addressed, classical neutrality, is itself temporally *confined*.⁴⁴ While permanent neutrality requires neutrality in all future wars, neutrality itself cannot be permanent because it exists only when there is a current state of war. By definition, permanent neutrality is not analyzable as a constituent of the international law institution of classical neutrality.

There is, however, an elegant jurisprudential solution to this conceptual paradox.⁴⁵ To begin with, the choice between a peacetime behavior of *prospective* neutrality that is circumscribed by international law, and one that is freely-patterned by the permanently neutral state, has exercised the minds of jurists since the end of the last century. Adopting the terminology suggested in a 1981 study by Austrian scholar Manfred Rotter, these conflicting positions can be respectively designated the "prophylactic theory" and the "obligation theory."⁴⁶ The prophylactic theory, which restricts permanent neutrality to its "primary" obligation (*pro futuro* neutrality in all wars) was first proposed by the Swiss jurist Paul Schweizer, writing

Republic of Ireland, is English-speaking. See Neuhold, *supra* note 14, at 231 n.1 (noting the absence of a comprehensive and comparative literature on the European neutrals in English); see also Vagts, *supra* note 3, at 84 n.4 (noting the scarcity of recent discussions of neutrality other than a few articles with a Swiss perspective, which must necessarily be "idiosyncratic," in Vagts's view, because of Swiss aloofness from the United Nations).

⁴⁴ Thus, the Hague Conventions, which codify the authoritative models of belligerent and neutral behavior, have a normative content of rights and duties which is automatically deprived of meaning and effect once the law of peace is restored. The Preambles of Hague Conventions V and XIII establish that the rules they contain are to be applied respectively to "the rights and duties of neutral powers in case of war on land," and the harmonizing of rules for "the event of naval war." ROBERTS & GUELFF, *supra* note 13, at 63, 110.

⁴⁵ The paradox may explain why international law scholars sometimes mistakenly assume that permanent neutrality in peacetime is a mere emanation of a state's foreign policy preferences, rather than being an institution of international law *per se* that imposes specific normative conditions. See Göran Lysén, *Some Views on Neutrality and Membership of the European Communities: The Case of Sweden*, 29 COMMON MKT. L. REV. 229, 233 (1992) (commenting that "the more or less peaceful conditions in international affairs do not by themselves affect the legal requirements relative to the status of neutrality").

⁴⁶ See ROTTER, *supra* note 22, at 104, 108.

in 1895.⁴⁷ For Schweizer, permanent neutrality was merely a form of continually-repeating classical neutrality, which in peacetime remained essentially latent.⁴⁸ As such, this status could not be infringed by the permanently neutral state in peacetime—unless there were treaty-based or recognition-based obligations.⁴⁹ This view certainly reduced permanent neutrality to a bloodless formula—prospective classical neutrality.

The obligation theory—which I adopt in this Article—imposes a legal duty on the permanently neutral state in peacetime not to compromise its capacity for unfettered neutrality in wartime.⁵⁰ The jurist who pioneered the obligation theory was Karl Strupp.⁵¹ Strupp's analysis, which I synopsise here, was based on the extra-legal perception that the institution of permanent neutrality can only successfully discharge its intended geopolitical "ordering function" if third states can confidently plan their foreign policies on the assumption that permanently neutral states are not only willing, but in fact have the capacity, to adopt neutrality in the event of future armed conflict.⁵² It is not therefore sufficient—*pace* Schweizer and his successors—that the international law delict flowing from breach of a previous pledge of future neutrality should only come into being at the moment when that neutrality is formally triggered, *i.e.*, at the commencement of war. By then it is already too late to demand from the permanently neutral state *restitutio in integrum* of the international order that was preconfigured by the original adoption of its status. Removal of the delict, however, can only happen if the behavior-alignment of the permanently neutral state toward its future obligation of neutrality is construed not as a prudent policy of neutrality, but as a genuine enforceable legal duty. Notwithstanding the classical view that neutrality presumes a war, permanent neutrality in peacetime produces international law "pre-effects" that are fully equivalent in their practical impact to the effects of classical neutrality in wartime.⁵³

⁴⁷ See PAUL SCHWEIZER, *GESCHICHTE DER SCHWEIZERISCHEN NEUTRALITÄT* [HISTORY OF SWISS NEUTRALITY] 72 (1895).

⁴⁸ See *id.* at 87.

⁴⁹ See *infra* note 80 (discussing third-party guarantees).

⁵⁰ See ROTTER, *supra* note 22, at 108.

⁵¹ See STRUPP, *supra* note 21, at 214.

⁵² See *id.*

⁵³ See *id.* Strupp's obligation theory has been widely approved. See VERDROSS, *supra* note 23, at 18–19; Hummer, *supra* note 17, at 12. Both Austria and Switzerland officially embraced the obligation theory. Although these statements did not of themselves comprise formal sources of law, they represented, as Schweitzer stated, "expressions of the *opinio juris*, starting-points for the building-up of rules of customary international law." SCHWEITZER, *supra* note 16, at 90; see also *Conception officielle suisse de la neutralité*, reprinted in VERDROSS, *supra* note 23, at 36–37;

A permanent neutrality, therefore, seeks to perpetuate the reciprocal rights and duties which classical neutrality postulates for wartime, in other words to “overstretch” the temporal and factual fields of validity of the norms of behavior of classical neutrality.⁵⁴ Moreover, unlike permanent neutrality as a mere unilateral political maxim of *desired* neutrality in all future wars, the overstretching of neutrality which flows from the juridical institution of permanent neutrality introduces a separate normative content for permanent neutrality, so that its cardinal purpose—to ensure in peacetime that the adhering state will adopt classical neutrality in wartime—can be achieved. The normative instruments that allow permanently neutral states to perpetuate or overstretch the norms of classical neutrality are called the secondary or derived duties (known in German jurisprudence as *Vorwirkungen*—literally, “pre-effects”) of permanent neutrality.⁵⁵ More specifically, the primary duties of wartime neutrality, overstretched into the law of peace, allow a kind of anticipatory projection of a core of secondary peacetime duties of permanent neutral states derived by one-to-one correspondence from the wartime obligations of neutrals.

2. Deriving Permanent Neutrality's Key Obligations

The paramount obligation of permanent neutrality is the renunciation of any action in peacetime that would jeopardize or render impossible the fulfillment of the mandates of classical neutrality in wartime.⁵⁶ The obligation not to conclude in peacetime any treaties of mutual military assistance (whether defensive and offensive, or only defensive) is derived from the overarching wartime obligation of nonparticipation in the wars of other states.⁵⁷

The primary duty of abstention projects an anterior peacetime duty of permanently neutral states to eschew treaties and conventions which would obligate

Bruno Kreisky, *Austria Draws the Balance*, 37 FOREIGN AFF. 269, 275 (1959).

⁵⁴ See Hummer, *supra* note 17, at 4; see also Subedi, *supra* note 2, at 241.

⁵⁵ See Hummer, *supra* note 17, at 7.

⁵⁶ See ROTTER, *supra* note 22, at 108; see also the words of the *Conception officielle suisse*, admonishing permanently neutral states that they should “not *vis-à-vis* other countries enter into any obligations which in case of war would commit [them] to conduct contrary to neutrality.” VERDROSS, *supra* note 23, at 38.

⁵⁷ See STRUPP, *supra* note 21, at 234; see also ROTTER, *supra* note 22, at 163; VERDROSS, *supra* note 22, at 198. There is no objection, however, to purely passive treaties of assistance—in other words, defensive alliances which do not bind the permanently neutral state to reciprocal obligations. Such an arrangement, which is in effect a *guarantee*, can be of immense value in securing future respect for its chosen status. The concept of the alliance is confined to stating the duty of the other contracting powers to assist the permanently neutral state in its self-defense. See *infra* note 80 (discussing guarantees by third states).

them in wartime to channel war materials or troop contingents to one or more belligerent powers.⁵⁸ The duty of impartiality, which has a weak normative projection into peacetime in the absence of a wartime duty of economic neutrality, implies only a general obligation not to undertake legal commitments in peacetime that will jeopardize the future observance of classical neutrality, including the duty of impartiality.⁵⁹ Finally, in peacetime, the neutral duty of prevention projects an antecedent obligation to conclude no transit treaties which would bind the permanently neutral state to allow wartime transit of a belligerent's armed forces or munitions. More generally, the permanent neutral in peacetime should refrain from the toleration of foreign power military bases in the widest sense.⁶⁰ Because the neutral's wartime duty of prevention requires it only to use the means at its disposal to repel violators,⁶¹ it might be thought that there is no derived peacetime duty to maintain a defense capacity or to take specific measures aimed at repulsing future attempted violations of its neutrality. The better view, however, is that only the *level*

⁵⁸ Although the modern position is indisputable, during the eighteenth and early nineteenth centuries it was not considered a violation of neutrality for a neutral to make troops available on the basis of treaties which were concluded prior to the outbreak of war. See OPPENHEIM, *supra* note 6, § 316, at 675; see also SCHWEITZER, *supra* note 16, at 115. Bonjour, in his history of Swiss neutrality, mentioned the former practice of the Swiss cantons of supplying mercenaries for compensation. See EDGAR BONJOUR, *LA NEUTRALITÉ SUISSE: SYNTHÈSE DE SON HISTOIRE* [SWISS NEUTRALITY: A SYNTHESIS OF ITS HISTORY] 13 (1978).

⁵⁹ As a guiding tenet of neutrality policy in peacetime, however, the principle of impartial treatment has obvious application to the behavior of a permanently neutral state. During the Cold War, for example, Finland's weapons importation policy deliberately struck a balance between East and West. See WOKER, *supra* note 13, at 42.

⁶⁰ The prohibition on military bases can be extrapolated from the proscriptions in Article 3 of Hague Convention V relating to nonuse by belligerent powers of telecommunications installations on neutral territory, and in Article 4 against the formation of corps of combatants or the opening of recruitment offices by the belligerents on neutral territory. See ROBERTS & GUELFF, *supra* note 13, at 63. This obligation can also be derived from the more specific language of Article 5 of Hague Convention XIII, enjoining belligerents not "to use neutral ports and waters as a base of naval operations against their adversaries," in tandem with Article 25, the catch-all provision imposing a general duty of prevention on neutral powers. See *id.* at 111, 114. The obligation can also be deduced from the provisions in Articles 4 and 5 of Convention XIII that limit the stay of warships in neutral ports and prohibit the fitting out or arming in neutral ports of vessels intended for use in hostile operations against a power with which the neutral is at peace. See *id.* at 111–12. For Austria, however, the anterior obligation of prevention flows directly from its instrument of permanent neutrality, the Constitutional Law on Neutrality, which declares in Article I(2) that "Austria will never in the future . . . permit the establishment of military bases of foreign states on her territory." See AUSTRIAN FEDERAL MINISTRY OF FOREIGN AFFAIRS, *THE AUSTRIAN FEDERAL CONSTITUTION* 143 (Charles Kessler trans., 1983) [hereinafter AUSTRIAN CONSTITUTION (1983)]; see also SCHWEITZER, *supra* note 16, at 113.

⁶¹ See *infra* note 62 (discussing the principle of *ultra posse nemo tenetur*).

of defense preparations, rather than the initial duty to make them, is optional for the permanently neutral state—and therefore is a component of a general neutrality policy.⁶²

⁶² See *infra* text accompanying notes 65, 344 (discussing optional foreign policy measures to enhance status of neutrality, collectively described as a neutrality policy). The most frequent view is that although the duty of prevention does not in itself give rise to an obligation in peacetime to prepare for the defense of wartime neutrality, it does give rise to a duty to repel violations of that neutrality, and such a duty, amplified by the obligation to remain outside all future wars, makes it imperative for permanently neutral states to prepare in peacetime for the future defense of their neutrality in wartime. See VERDROSS, *supra* note 23, at 44; see also SCHWEITZER, *supra* note 16, at 138; STRUPP, *supra* note 21, at 215. The alternative, minority view insists upon a strict application of the obligation theory. See *supra* text accompanying note 50. It holds that because the wartime duty of prevention is governed by a requirement only to use all the means at the neutral's disposal—which may in a given situation be no means other than diplomatic protest—there is no wartime duty which can generate a coordinate peacetime responsibility. See ROTTER, *supra* note 22, at 158–59 (articulating a *right*, rather than a *duty*, of armed neutrality). Even if the majority view is accepted, the general legal principle *ultra posse nemo tenetur* still holds good. As Verdross maintained, the choice of measures for an armed neutrality in peacetime must be left to the discretion of the permanently neutral state, but “[i]n any case its duty ends at the same point as does its material capacity.” VERDROSS, *supra* note 23, at 45. As the main text suggests, the better view is to regard the level of defense preparedness (as opposed to the initial existence of a duty of preparedness) as a product of each permanently neutral state's neutrality policy. Austria, Sweden, and Switzerland, for example, have embraced the concept of armed neutrality. See RICHARD A. BITZINGER, NEUTRALITY FOR EASTERN EUROPE? AN EXAMINATION OF POSSIBLE WESTERN ROLE MODELS 5 (RAND Security Symposium Paper, Feb. 1990) (on file with author) (discussing extensive defense preparations of all three neutrals). But see Article 13 of the Austrian State Treaty, *infra* note 129 and accompanying text, which is one of the basic instruments of Austrian neutrality and prohibits Austria from possessing, constructing, or experimenting with any nuclear weapons or guided missiles; see also AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 103. Official Swedish defense policy, for example, has adopted the “entrance price strategy,” which was usefully summarized by former Foreign Minister Nils Andrén: “[T]he defense must have such a strength and composition that a prospective aggressor cannot because of any Swedish shortcomings in this respect misunderstand the seriousness behind our political declarations.” Nils Andrén, *Sweden's Security Policy*, in J.J. HOLST, FIVE ROADS TO NORDIC SECURITY 123, 144 (1973). For Austria, Article I(1) of the Constitutional Law on Neutrality provided that “Austria of her own free will declares herewith her permanent neutrality which she is resolved to maintain and defend with all the means at her disposal.” AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 143. The states which have recognized Austrian neutrality, see *infra* text accompanying note 136, could not allege an international law delict on the basis of failure to plan for specific military-strategic contingencies, but they presumably could hold Austria responsible in international law for failure to take *any* preparations to assure the future maintenance and defense of its permanent neutrality.

3. Again, No Economic or Ideological Obligations

As I have shown, classical neutrality entails no duties of economic or ideological neutrality.⁶³ A duty of wartime economic neutrality, if it existed and were projected into an antecedent obligation of permanently neutral states, would impose an extraordinary burden of impartiality in an era of complex economic interdependence. It is reasonable to assume that permanently neutral states, in that context, should not have to practice a form of commercial even-handedness that could only truly succeed by requiring autarky, an obligation that encumbers no other sovereigns as a matter of international law.⁶⁴

Ideological neutrality, moreover, has had a rather different implication for permanently neutral states. Beyond the core legal obligations of their status,⁶⁵ these states have tended to adopt prophylactic measures of foreign policy, loosely described as a “neutrality policy,” to promote confidence in and respect for permanent neutrality. While not amounting to ideological impartiality, these measures of conflict reduction—at least in the Cold War era—served a useful buffering function between antagonistic blocs. Neutrality policy also kept Austria, Sweden, and Finland out of the EU until quite recently,⁶⁶ although I will argue in Part IV that membership of the EU, even before its ambition to transform itself into a military syndicate as well as an economic one, was always incompatible with the law of permanent neutrality.

III. THE EMPIRICAL LIFE OF PERMANENT NEUTRALITY: FIVE STATES IN SEARCH OF A RECONCEPTUALIZATION

In this Part, I will investigate the permanent neutrality of five European states and classify the kind of permanent neutrality (factual, legal, or mixed factual and legal) practiced by each. I will also weigh what each state’s experience contributes to the task of reconceptualizing permanent neutrality, in preparation for an integrated discussion in Part IV of the legal and political challenges that the

⁶³ See *supra* text accompanying note 30.

⁶⁴ See Neuhold, *supra* note 14, at 255 (describing the tendency by some Austrian advocates of EU membership to discount the economic dimension of neutrality, on the ground that neutral states must not be required to maintain a higher degree of economic autonomy than “normal” (i.e., non-neutral) states, in a world where international economic interdependence is endemic).

⁶⁵ This is not to preempt the discussion of legal and factual permanent neutrality in Part III. Of the five European neutrals discussed in this Article, only Austria and Switzerland have practiced permanent neutrality unequivocally as a matter of legal duty. See *infra* Parts III.B.1–2.

⁶⁶ Switzerland has never joined the EU; Ireland, however, joined in 1973. See *infra* text accompanying note 265.

European Union now represents for all of them. First, however, I briefly analyze how states, if they choose to assume a legal as opposed to a factual status of permanent neutrality, may use instruments of international law to do so. Through this analysis, I show that well-tried mechanisms of international law can be flexibly adapted to serve a reworked code of permanent neutrality.

A. *The International Law Instruments for Adopting Permanent Neutrality*

1. *Introducing a New Term of Art—Neutralitization*

States must choose to become permanently neutral, and only exceptionally is permanent neutrality thrust upon them.⁶⁷ While permanent neutrality shares with classical neutrality the quality of possessing a corpus of duties (and sometimes rights) established by international convention and by custom, unlike classical neutrality it is not an automatic, self-generating legal condition.⁶⁸ In fact, the idea that a state during peacetime would be assumed to be permanently neutral unless it expressly uttered to the contrary is a manifest absurdity, because permanent neutrality lacks a correlative and opposite status (other than mere nonpermanent neutrality) which would give meaning to a duty to utter.⁶⁹ Classical neutrality, on the other hand, is in enduring tension with a correlative and opposite status of belligerency.⁷⁰ Moreover, and again in contradistinction to classical neutrality, it appears that—*apart from* any instruments of adoption—permanent neutrality as an institution imposes duties, but confers no rights, on the adopting states.⁷¹ It would not therefore be in harmony with the sovereign right of self-determination of states

⁶⁷ See *infra* text accompanying note 133 (discussing alleged imposition of permanent neutrality on Austria as the price of release from a four-power occupation).

⁶⁸ Classical neutrality is an automatic status between its poles of temporal validity—the commencement and termination of a lawful state of war—and does not even require an express declaration or manifesto by nonbelligerent states. See SCHMITT, *supra* note 14, at 72. Schmitt expressed the difference in the following terms: “At the commencement of war all nonparticipating states are, it is true, automatically neutral, but they are not ‘made neutral.’” *Id.*

⁶⁹ See SCHWEITZER, *supra* note 16, at 42.

⁷⁰ See GREBER, *supra* note 21, at 16.

⁷¹ The rights of a permanently neutral state comprise a brief catalogue when compared with its duties. Its wartime “right” to repel violations of its neutrality is in truth a *duty*, see *supra* text accompanying note 26, but in war and peace it does have the right to have its neutrality respected by the appropriate circle of recognizing states. See *infra* text accompanying note 80 (discussing guarantees by third states).

to impose upon them a catalogue of duties that they could only renounce by express public utterance.⁷²

In traditional international law parlance, the process by which a state becomes permanently neutral (as a binding obligation of international law) is called "neutralization." Politically, this would not be the happiest term for a putative permanent neutral, since it obviously connotes that the state has become the *object* of the action, rather than the subject actor.⁷³ And, in common parlance, to be "neutralized" carries a connotation of weakness, enervation, and elimination from contention, and sovereign states usually do not like to think of themselves as political eunuchs.⁷⁴ Neutralization is also a term used in the literature to describe an

⁷² Classical neutrality, in contrast, is renounced by a specific declaration of intention to assume the status of a cobelligerent. See OPPENHEIM, *supra* note 6, § 293, at 653–54. The precise formula of words by which a status of permanent neutrality is established is not predetermined by international law. The term *neutralité permanente* first entered the technical vocabulary of international law with the Peace Treaty of Amiens of 1802, which *inter alia* proclaimed that status for the island of Malta. See Hummer, *supra* note 17, at 9. At the Congress of Vienna 13 years later, the future international status of Switzerland was designated *neutralité perpétuelle*, or in German *immerwährende Neutralität* (translatable, in both instances, as "permanent" neutrality). Since then, virtually all treaties adopting permanent neutrality have included a formula of words modeled on one or other of these precedents. For an example, see the permanent neutrality instruments for Belgium and Luxembourg, reprinted in 1 A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 51, 757 (Francis Deák & Philip C. Jessup eds., 1939). Nevertheless, even if the expression "permanent neutrality" does not appear in an international instrument, as for example in the case of Laos in 1962, it may still be possible, by assembling the obligations assumed by the candidate state and by scrutinizing the language used in the instrument, to conclude that a status of permanent neutrality has indeed been adopted. See generally Declaration on the Neutrality of Laos, July 23, 1962, 14 U.S.T. 1104, 456 U.N.T.S. 301; John J. Czyzak & Carl F. Salans, *The International Conference on the Settlement of the Laotian Question and the Geneva Agreements of 1962*, 57 AM. J. INT'L L. 300 (1963).

⁷³ Permanent neutrality is sometimes adopted by a state in such a manner that it appears to have been imposed by the will of other states (who may even act as guarantors of its observance). That state, in other words, appears to have been "neutralized." This was certainly what happened to Laos in 1962. See BLACK ET AL., NEUTRALIZATION AND WORLD POLITICS 29–30 (1968). It was probably the case with Austria in 1955, despite occasional suggestions to the contrary. See *id.* at 29 (commenting that "Austria was free . . . only to choose between continued occupation and permanent neutrality"). For a recent official concession that Austria's permanent neutrality was imposed from outside, see *infra* note 134.

⁷⁴ In its extreme form, this view of neutral states leads to the kind of assertion quoted by Jean Ziegler in his indictment of Swiss relations with the Nazi Reich: "'Switzerland does not exist.' By this, André Gorz implies that a country which constantly avoids adopting an international position, which refuses to take sides and sometimes goes so far as to deny the existence of conflicts that are tearing people and nations apart, possesses no international existence." ZIEGLER, *supra* note 3, at 168. Ziegler himself, it must be added, disagreed with Gorz's assessment, since Switzerland, in

entirely distinct institution—the creation of an internationalized, demilitarized *cordon sanitaire*.⁷⁵ To overcome both the political connotations and the terminological confusion, I will substitute a neologism, “neutralitization,” to describe the code of general international principles by which a state adopts the legal status of permanent neutrality in accordance with international law.⁷⁶ Unlike the ambiguity in the root of the word “neutralization,” the new coinage is a perfect semantic match with the doctrine of neutrality.

2. *Four Archetypes of Neutralitization*

Surveying state practice, neutralitization as an operation of international law occurs using one or more of four basic legal archetypes: international treaty, the dual processes of notification and recognition, unilateral declaration (a method that I derive from the controversial *Nuclear Tests* opinion of the International Court of Justice), and crystallization of custom.

a. *International Treaty*

International treaty is the most common method of neutralitization, as in the case of Switzerland in 1815 (between the Swiss and a coalition of great powers)⁷⁷ and Laos in 1962 (involving a mixed group of small and great powers).⁷⁸ The precise constellation of participating powers should be incidental. A bilateral agreement with a neighbor, for example, would probably suffice.⁷⁹ It is always

Ziegler's thesis, is a financial and economic “great power.” *Id.*

⁷⁵ While permanent neutrality governs the entire state territory of the permanently neutral country, the second meaning of neutralization in public international law is the establishment of an international status pertaining only to portions of state territory (inclusive of rivers, canals, and straits), to portions of the high seas, or exclusively to particular installations or facilities (such as an international waterway), all of which are protected by this status against becoming a “region of war.” Stephan Verosta, *Neutralization*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 31, 33. On the related—and neoteric—institution of “zones of peace,” see *infra* note 368.

⁷⁶ As used in this Article, neutralitization describes *all* instances of the adoption of permanent neutrality, whether the element of imposition is plausibly present or not. This is the usage preferred in BLACK ET AL., *supra* note 73, at vi, for the proto-term neutralization.

⁷⁷ See *infra* text accompanying note 113 (discussing Swiss instruments of neutralitization).

⁷⁸ See BLACK ET AL., *supra* note 73, at xii. The multilateral neutralitization guarantee to Laos proved ephemeral. After an eventual Communist takeover, a Laos/Vietnam treaty in 1977 formally ended Laotian neutrality. See SURYA P. SUBEDI, *LAND AND MARITIME ZONES OF PEACE IN INTERNATIONAL LAW* 148 (1996).

⁷⁹ Indeed, analogously with the former bilateral treaties of classical neutrality, see

politically expedient, however, for the neutralizing state to include a cluster of major military-strategic powers among the contracting parties, because as a matter of general international law only states that are parties to an international law treaty have a right during the currency of the treaty to bring a legally-cognizable claim for its enforcement.⁸⁰

b. A Contract Simulacrum: Unilateral Promise, Notification, and Recognition

Austria's 1955 declaration of permanent neutrality, accomplished through a domestic constitutional law,⁸¹ raised the possibility of an alternative to neutralization by international treaty.⁸² Thus, Austria accompanied its changed status by a request for, and receipt of, international recognition of that status. This process—a unilateral promise, notification of the promise to third states, and receipt of recognition from third states—is a kind of simulacrum of the domestic contract formation paradigm.⁸³ Unlike municipal contract law, however, by the very fact of

OPPENHEIM, *supra* note 6, § 306, at 665, even a bilateral international agreement can establish permanent neutrality—although, like the classical neutrality precedents, such a bilateral system would be open to the criticism of approximating to an alliance. Bindschedler, for example, thought that such a treaty would be aimed at support for or preference of the treaty partner. See Rudolf L. Bindschedler, *Die Neutralität im Modernen Völkerrecht* [Neutrality in Modern International Law], 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [JOURNAL OF FOREIGN PUBLIC LAW AND INTERNATIONAL LAW] 1, 3 (1956–57). But see Malta's 1981 treaty with Italy, *infra* note 104, under which Italy recognized and undertook to respect the sovereignty, independence, neutrality, and territorial integrity of Malta. See 5 ITALIAN Y.B. INT'L L. 353–55 (1983) (setting forth the relevant text of Exchange of Notes).

⁸⁰ See Hummer, *supra* note 17, at 13. The cosignatories which have undertaken to respect—and occasionally also to guarantee—the status of permanent neutrality, have the right to treat any infringement of a legal duty by the permanently neutral state (whether set by the particular instrument of neutralization or by the rules of the international law institution of permanent neutrality, or both) as an international delict which gives rise to a claim for reparation. See ROBERT, *supra* note 25, at 42. In exchange for this circumscription of its freedom, the neutral state may gain not only respect for its status but a guarantee of intervention on its behalf. The wider and more powerful the circle of contracting states, the more valuable that guarantee.

An infringement by the permanently neutral state during *wartime* of any of the duties of classical neutrality that it is bound by its status to observe, will confer upon *all* aggrieved belligerents the standing of petitioners for reparation—irrespective of whether or not they are also cosignatories of the treaty of neutralization. See *id.*

⁸¹ See *infra* text accompanying note 127 (discussing Austrian instruments of neutralization).

⁸² But see *infra* text accompanying note 139 (discussing possible treaty dimension to Austrian neutralization).

⁸³ This process is a simulacrum (in addition to the reasons given in the main text) because the

notification—provided there is such notification—legal consequences for the notifying state are instantly produced. As an autonomous operation of international law, however, a notified unilateral promise can only produce unilateral legal consequences. It can only impose *duties* upon, but accord no *rights* to, the promisor state.⁸⁴ Those rights can flow only from the coordination of the autonomous operation of “promise and notification” with a separate and equally autonomous international law operation, which also issues unilaterally, that of recognition. Recognition in this sense should not be confused with the similarly-named concept that denotes the granting or withholding of approval with respect to emergent state entities.⁸⁵ That kind of recognition can indeed be a political acknowledgment of a pre-existing *de jure* situation, but recognition in the present context is a unilateral independent legal transaction applied to a particular claim or state of affairs which may, at the time it is made, be only *de facto*. The conversion of the claim or state of affairs into an internationally binding obligation does not therefore precede the act of recognition, it is the *consequence* of that act.⁸⁶ As with international treaties, neutralization by notification and recognition also creates a closed circle of states which are granted a legally-enforceable claim for reparation if the permanently neutral state commits a transgression of the applicable law of permanent neutrality.⁸⁷ Thus, the original promise may only be a unilateral transaction, but

recognition might only be a rough facsimile of domestic contract acceptance. Although the notification invited acceptance of the unilateral promise, and presumably sought an express and formal recognition of the new status, the responses have included a recognition by taking note without objection, or the mere confirmation of receipt of the notification. *See* Hummer, *supra* note 17, at 6–7; *see also* ROBERT, *supra* note 25, at 32; Josef L. Kunz, *Austria's Permanent Neutrality*, 50 AM. J. INT'L L. 418, 421 (1956); Karl Zemanek, *Neutral Austria in the United Nations*, 15 INT'L ORG. 408, 409 (1961).

⁸⁴ *See* Hummer, *supra* note 17, at 8.

⁸⁵ *See* GREIG, *supra* note 26, at 120.

⁸⁶ *See* ERIK SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC [UNILATERAL LEGAL ACTS IN PUBLIC INTERNATIONAL LAW] 203 (1962). *But see infra* text accompanying note 89 (discussing unilateral permanent neutrality).

⁸⁷ *See also* ROBERT, *supra* note 25, at 43–44. Once the status of classical neutrality has been engaged, the circle correspondingly widens to embrace belligerents not already participants in the neutralization. *See id.* In fact, although this sequence does not constitute a treaty in the sense intended by Article 2(1)(a) of the Vienna Convention on the Law of Treaties, because it requires no “written form,” it nevertheless produces legal rights and duties exactly corresponding to those which an international law treaty is competent to produce. For the text of Article 2 of the Vienna Convention, *see* 8 I.L.M. 679, 680–81 (1969); *see also* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 1999–2000, at 50 (1999). Consequently, the same conditions for termination that govern international law treaties will regulate the cessation of the status of permanent neutrality when it is created by the triple sequence—the promisor state will similarly be precluded from unilateral revocation of its international law undertakings. *See*

when augmented by notification and recognition it carries the same legal force as a duty undertaken by international treaty, and will therefore be governed by the same basic principles of good faith and mutual trust applicable to treaties.⁸⁸

c. Unilateral Permanent Neutrality (The "Nuclear Tests" Method)

Although Joseph L. Kunz wrote in 1955 that a "[s]tate cannot become permanently neutral in international law by its own unilateral declaration,"⁸⁹ the International Court of Justice opinion in the *Nuclear Tests* cases in 1974⁹⁰ suggested that, in some circumstances, unilateral expressions of sovereign intent may create international law obligations.⁹¹ Under this much-debated jurisprudence,⁹² a state

VERDROSS, *supra* note 23, at 30. *But see infra* note 145 (discussing how Austria might unilaterally renounce its neutralization).

⁸⁸ See Kunz, *supra* note 83, at 423–24.

⁸⁹ *Id.* at 418.

⁹⁰ *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20). The two cases followed identical tracks:

As is shown by the texts of the two judgements, one in the Australian and the other in the New Zealand case, one is modeled on the other, the cases were examined, pleaded and deliberated upon together; the Applications initiating proceedings were filed on the same day and the steps preparatory to the judicial proceeding [have] been exactly parallel.

Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. at 480 (separate opinion of Judge Gros). All references in this Article, therefore, are to the judgment of Dec. 20, 1974 (*Austl. v. Fr.*).

⁹¹ Australia and New Zealand sought a ruling of the International Court that French tests of nuclear weapons in the atmosphere, then being conducted in the South Pacific area, were in violation of international law. The French Government had refused to comply with the court's interim order requiring that France refrain from commencing further tests until the court reached a decision in the case. However, in a series of public pronouncements, the French Ministers of Defense and Foreign Affairs had stated that France was in a position to proceed to underground testing in the following year, and the President of the Republic had announced at a press conference that he had "made it clear that this round of atmospheric tests would be the last." The International Court concluded that, because these utterances should be construed as legally binding upon the French Republic, *erga omnes*, the Applicants had accordingly achieved their object in commencing the proceedings, namely, the cessation of atmospheric tests for the future, and that therefore the dispute between the parties no longer existed and a declaratory judgment need not be issued. See *Nuclear Tests*, (*Austl. v. Fr.*), 1974 I.C.J. at 269–70.

⁹² See *infra* note 98. For a recent analysis, written after New Zealand unsuccessfully sought a re-examination of the 1974 judgment in light of France's commencement of underground nuclear testing, see Barbara Kwiatkowska, *New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance*, 37 VA. J. INT'L L. 107 (1996). See also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974

must *intend* to become bound by the terms of its declaration. Breaking from the quasi-contractual model of notification coupled with recognition, the court detected no need for a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other states.⁹³ Once such a statement is properly deemed to exist, it will be assumed that the declarant state did not utter its declaration in "implicit reliance on an arbitrary power of reconsideration."⁹⁴ Moreover, unlike the first two modes of neutralization, such a declaration would seem capable *ipso facto* of possessing binding force with respect to the whole community of states, and not solely in relation to a closed circle of participating states.⁹⁵

By holding that unilateral promises *per se* can have binding legal effects, and that incidents such as notification and acceptance were optional, the majority confirmed indirectly the legality of the more involved process of unilateral promise, notification, and recognition.⁹⁶ If legal security is indeed the shared desideratum of the entire court in the *Nuclear Tests* decision, the only secure method for guaranteeing it, if an international treaty is not used, is the coupling of a state's unilateral undertaking with a requirement to notify third states and to request an acceptance by recognition. Otherwise, with only a unilateral promise, or a unilateral promise which has been notified but so far unrecognized, the promisor state is made subject to obligations but given no rights in international law, and there is consequently no guarantee that the promise will not be retracted in the future—as

in the *Nuclear Tests Case* (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22) [hereinafter *Request for an Examination Case*]. The 1974 judgment concerned atmospheric testing, but the International Court declined in 1995 to accept a teleological reading of its prior opinion that would have applied it to the reduction of nuclear contamination through all forms of testing. See Kwiatkowska, *supra*, at 179. The 1995 judgment, while refusing to re-examine French nuclear testing policy, nonetheless stood by the jurisprudential principles discussed in the present Article. See *Request for an Examination Case*, *supra* 1995 I.C.J. at 289.

⁹³ In the court's view, such a requirement:

would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made . . . this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference Thus the question of form is not decisive.

Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. at 267–68.

⁹⁴ *Id.* at 270.

⁹⁵ The same caveat must be entered here, however, as I made in discussing the legal effect of a unilateral promise with notification. Lacking any marks of reciprocity or mutuality, a unilateral declaration standing alone can serve only to impose duties upon, and accord no rights to, the declarant state. See *supra* text accompanying note 84.

⁹⁶ See *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. at 270.

dissenting judge De Castro postulated.⁹⁷ Despite these juridical shortcomings, the *Nuclear Tests* jurisprudence nevertheless suggests a third process of neutralization which I will call unilateral permanent neutrality. It may be a helpful juristic tool to dispel some of the juridical cloudiness of Finnish permanent neutrality, and also in understanding the empirical ambivalence of the factual permanent neutrality practiced by Sweden and Ireland.⁹⁸

d. Neutralization by Custom

Finally, Swiss neutrality is said to enjoy the additional status of reflecting customary international law.⁹⁹ Switzerland, animated by this *amour-propre*, looks

⁹⁷ See *infra* note 98.

⁹⁸ For an unsparing critique of the *Nuclear Tests* opinion, see Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 28 (1977) (arguing that the opinion lacked support in state practice and writings of publicists, and that France "intended not to be bound to anything more than a short-term self-abstinence from atmospheric testing"). Yet the most comprehensive attack on the majority's insouciant approach to the question of legal security—"[o]nce the Court has found that a state has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it," *Nuclear Tests* (Ausl. v. Fr.), 1974 I.C.J. at 272—was contained in the dissenting opinion of Judge De Castro. See *id.* at 372. Judge De Castro asked whether, assuming that the French authorities who made the statements had the power to bind the Republic of France (a question of internal constitutional law and international law) was it their intention to place the French state under obligation to renounce all possibility of resuming atmospheric nuclear tests, "even in the event that such tests should again prove necessary for the sake of national defen[s]e"? See *id.* at 374. That obligation, the judge concluded, could not "be presumed and must be clearly manifested if it is to be reliable in law." *Id.* In his view, the French declaration was strictly in the realm of politics, not legal obligation. *Id.* at 375. Judge De Castro's skepticism, it must be conceded, merits a strong measure of *realpolitik* respect. After all, if the French authorities *had* finally resolved to discontinue atmospheric tests, one would have supposed that the French would have acceded to the Nuclear Test Ban Treaty. Under the Treaty, withdrawal is possible if a party "decides that extraordinary events, related to the subject matter of this treaty, have jeopardiz[ed] the supreme interests of its country." GREIG, *supra* note 26, at 455. Because France elected to express its intentions by unilateral declaration, one implication of the court's decision was that France thereby assumed a more onerous obligation than the Treaty itself required.

⁹⁹ The following concisely expresses the dual requirement for the crystallization of customary international law:

[A]lmost all the doctrine on the subject is limited to the statement that international custom results from similar and repeated acts by states—repeated with the conscious conviction of the parties that they are acting in conformity with law. Thus there would be two factors in the formation of custom: (1) a material fact—the repetition of similar acts by states, and (2) a psychological element usually called the *opinio juris sive necessitatis*—the feeling on the part of the states that in acting as they act they are fulfilling a legal obligation.

upon latter-day recognitions of its permanent neutrality as declaratory of existing international law.¹⁰⁰ In contrast, many statements by the governments of Sweden and Ireland, insisting on a so-called "free hand" policy,¹⁰¹ have seemed calculated to inhibit the crystallization of customary international law.¹⁰²

B. Neutralization: A Spectrum of State Practice

Neutralization as a significant means of managing power in the international

Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, in 18 BR. Y.B. INT'L L. 127, 129 (1937). To establish that a neutralization by custom had evolved, therefore, it would have to be shown not only that state practice, including that of states whose interests are specially affected, had been so extensive and uniform, and of sufficiently long duration, that a consensus had developed which recognized the permanent neutrality of a particular state, but also that the states concerned believed themselves legally obliged to observe that status. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20) ("Only if such [recognition] were based on their being conscious of having a duty to [recognize] would it be possible to speak of an international custom.") (citation omitted). Dahm supposed, for example, that the permanent neutrality of Switzerland—apart from its instruments of neutralization—rested on custom as part of what he called the "European order." GEORG DAHM, 1 VÖLKERRECHT [INTERNATIONAL LAW] 175 (1958).

¹⁰⁰ *See* ROBERT, *supra* note 25, at 42.

¹⁰¹ The expression *Politik der freien Hand* [the policy of the free hand], with its connotation of discretion rather than obligation, was Schweitzer's. *See* SCHWEITZER, *supra* note 16, at 43. For its application to the neutrality experiences of Sweden, *see infra* text accompanying note 180.

¹⁰² *See* SCHWEITZER, *supra* note 16, at 43. Dahm in fact sought to sweep all the permanently neutral states, European and non-European, and irrespective of their variant modes of neutralization, into a universal precept of customary international law: "[I]f the special legal position of the neutrals in the international community is generally recognized, neutrality can develop as part of the general objective order of international law, taking shape as a permanent status of the neutralized [*sic*] states, which must then be respected by all the other states." DAHM, *supra* note 99, at 175. Hummer rejected Dahm's analysis on the ground that it made no attempt to discriminate between neutralization properly so-called and its inferior empirical variants, including not only the status of unilateral permanent neutrality but, even more tellingly, permanent neutrality as a discretionary mannerism of foreign policy. *See* Hummer, *supra* note 17, at 8–9. In Hummer's view, it would be impermissible to observe a series of existing political facts, namely, the adoption of permanent neutrality as a maxim of the foreign policy of certain states, and to seek inductively to assign to that collection of political "concretes" a "load-bearing capacity" sufficient to allow it to act as an institution of international law. *See id.* at 8. According to Hummer's critique, which offers a helpful jurisprudential referent in the present discussion, Dahm confused the *Sein*—the "is"—of subjective and unstable foreign policy maxims with the *Sollen*—the "ought"—of the objective modes of neutralization known to the international law institution of permanent neutrality. *See id.* at 9. This trenchant criticism might also be directed against the majority opinion in the *Nuclear Tests* decision. *See supra* note 90 and accompanying text. The issue, after all, is one of legal security. *See Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. at 320 (joint dissenting opinion).

system¹⁰³ has recurred frequently in state practice.¹⁰⁴ The examples of Austria in 1955¹⁰⁵ and Laos in 1962¹⁰⁶ were rigorously dissected by the United States Foreign Relations Committee when it examined the applicability of the law of permanent neutrality to the conflict in Southeast Asia, especially Vietnam, in 1966.¹⁰⁷ More recently, following the Soviet invasion of Afghanistan in December 1979, the then British Foreign Secretary Lord Carrington proposed the neutralization of that country as a compromise which would calm Soviet fears that the territory of Afghanistan would be used for hostile attacks on the Soviet Union.¹⁰⁸ In 1997, Hungary briefly flirted with a unilateral assumption of permanent neutrality as an alternative to membership in the newly-ascendant NATO.¹⁰⁹ In this Section, I examine the plenary legal neutralizations of Austria and Switzerland, the more legally opaque neutralization of Finland, and the self-consciously "political" neutralizations of Sweden and Ireland. The cases of Austria, Switzerland, and Finland, in particular, show features of the modes of neutralization identified in the last section, but the cadences of diplomatic practice prevented any one of them from becoming the exemplar of a single mode.

¹⁰³ See BLACK ET AL., *supra* note 73, at v.

¹⁰⁴ Malta is considered the first example of a permanently neutral state. Its neutralization dates from the Peace of Amiens between France and Great Britain in 1802, 13 years before the Swiss confederation was neutralized. Piccioni commented that, although the British broke the Peace of Amiens and occupied the island of Malta, thereby preventing its permanent neutrality from taking effect, European diplomacy nevertheless had a conception of neutrality from then on. See C. PICCIONI, *ESSAI SUR LA NEUTRALITÉ PERPÉTUELLE* [ESSAY ON PERMANENT NEUTRALITY] 28 (1902). In 1981, Malta again adopted permanent neutrality through an Exchange of Notes with Italy. See generally Natalino Ronzitti, *Malta's Permanent Neutrality*, in 5 ITALIAN Y.B. INT'L L. 171 (1983); see also SUBEDI, *supra* note 78, at 145–46 (emphasizing the unilateral nature of Malta's declaration, followed by recognition by Italy).

¹⁰⁵ See *infra* text accompanying note 124.

¹⁰⁶ See *supra* note 72.

¹⁰⁷ See SENATE COMM. ON FOREIGN REL., 89TH CONG., NEUTRALIZATION IN SOUTHEAST ASIA: PROBLEMS AND PROSPECTS (Comm. Print 1966).

¹⁰⁸ See *Clear Your Throats for a Ninefold Mumble* [sic], ECONOMIST, May 17, 1980, at 44. Had this occurred, it would have strongly resembled the Austrian interaction with the Great Powers in 1955 and, in that sense, have the imprint of an imposed status. See *infra* text accompanying note 133.

¹⁰⁹ Permanent neutrality, in fact, was widely anticipated to be a potential solution to the security vacuum in Eastern Europe after the 1989 revolutions. See Bitzinger, *supra* note 62, at 1; see also Gerhard Hafner, *The Impact of Developments in the East European 'Socialist' States on Austria's Neutrality*, in EUROPEAN NEUTRALS, *supra* note 10, at 181.

1. *A Tri-Form Neutralitization: Switzerland*

The emergence of a prototypical permanent neutrality for Switzerland can only be understood within the historical experience of an unstable, heterogeneous cantonal federation in the vortex of the recurring wars of the European balance of power system. Permanent neutrality evolved as an inner compulsion of the Swiss state, indispensable to its federal structure. A posture of unalterable indifference to the shifting hegemonies of the surrounding powers prevented the Swiss federation's inherent geographical, ethnic, linguistic, and confessional diversity from causing a centrifugal destruction of state unity as these disparate elements pulled toward support for opposite sides in foreign conflicts.¹¹⁰ To some extent, neutrality for the Swiss became a kind of mythic national symbol.¹¹¹

Swiss permanent neutrality has a long historical pedigree, which as noted above has allowed Switzerland to invoke for its neutral status the prerogative of custom.¹¹² But Switzerland can also claim a treaty-based neutralitization, arising out of the Great Power conclave at Vienna in 1815.¹¹³ At the Congress of Vienna, the Great Powers issued a Declaration conditioning recognition of Swiss neutrality (which was expressed to be in the "general interest") on agreement of the Swiss Parliament to a Convention resettling national frontiers, and both the Declaration and the Convention became part of the Final Act of the Congress.¹¹⁴ At Paris, on November

¹¹⁰ Thus, Denis de Rougemont's undoubtedly sardonic comment that "Switzerland is not a country—it is a defensive alliance." ZIEGLER, *supra* note 3, at 16 (quoting de Rougemont). Jean Ziegler's own view was no more kind to his native country: "To the Swiss, xenophobia is not only historically logical; it is an inherent necessity." *Id.* at 17. For the fullest modern account of the emergence of Swiss neutrality, see generally BONJOUR, *supra* note 58.

¹¹¹ It is not difficult to think of neutrality for the Swiss as a surrogate for the absence of a national *Sprachdenken* (literally, "speech-thinking"), since they lack a common speech community (four national languages coexist in the state) and a shared national spirit. See Hummer, *supra* note 17, at 15; see also Däniker, *supra* note 26, at 5 (observing that a status based originally on "rational calculations" gradually assumed the status of mythology. But see *supra* note 3 (discussing the moral compromise of Swiss neutrality caused by revelations of economic collaboration with the Nazi regime).

¹¹² See *supra* text accompanying note 99.

¹¹³ The Powers were Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, and Sweden-Norway.

¹¹⁴ They are contained in Articles 74 and 84 respectively. See ROTTER, *supra* note 22, at 57. In any event, the Swiss Diet acceded on May 27, 1815, to the conditions stipulated in the Declaration and thanked the Great Powers for their willingness to recognize Switzerland's permanent neutrality. For the text of the Declaration, see ROBERT, *supra* note 25, at 55. The frontier resettlement granted the Swiss three additional cantons—Geneva, Neuchâtel, and Valois—in order to make Swiss borders easier to defend and thereby to implement the

20, 1815, the Powers responded with an "Act of recognition and guarantee of the permanent neutrality of Switzerland and of the inviolability of its territory."¹¹⁵ As a technical matter, therefore, Swiss neutralization is predominantly a matter of treaty—and, more precisely, a triptych of treaties. The first treaty was between the Great Powers and the Swiss Parliament; the second treaty was among the Great Powers *inter se* (when they incorporated their Declaration into the Final Act of the Congress); the third treaty was, again, among the Great Powers *inter se* (the Act of recognition).¹¹⁶ To an extent, therefore, Switzerland was neutralized by the agreement of third parties, but the sovereign participation of the Swiss Parliament in the interval between the Great Power agreements makes it possible to interpret

Declaration's commitment "to furnish [to Switzerland] the means of ensuring its independence and neutrality" by a favorable territorial realignment. *See id.*

¹¹⁵ *Acte portant reconnaissance et garantie de la neutralité perpétuelle de la Suisse et de l'inviolabilité de son territoire*. The *Acte* did not include Switzerland itself as a cosignatory, although its reference to Swiss neutrality as being "in the genuine interest of European politics as a whole" had been advocated by the Swiss delegate to the Paris Conference, Pictet de Rochement. *See* SWISS U.N. REPORT, *supra* note 12, at 27; *see also* ZIEGLER, *supra* note 3, at 167–68. De Rochemont, in fact, drafted the text of the *Acte*. *See* ROBERT, *supra* note 25, at 56.

¹¹⁶ Support for the three-treaty conception appears in Article 435 of the Treaty of Versailles of June 28, 1919. *See* Stephan Verosta, *Peace Treaties After World War I*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 110, 113–15. France had proposed the inclusion in the Treaty of Peace with Germany of a provision abolishing the neutrality of Upper Savoy that had been established by the Final Act of the Congress of Vienna in favor of Switzerland. *See* SWISS U.N. REPORT, *supra* note 12, at 28. After negotiations, the Swiss conceded the abolition of Savoyan neutrality and, in return, received confirmation of the guarantees conceded to Switzerland by the 1815 transactions. Note now the precise manner in which Article 435 of the Treaty of Versailles reasserts these guarantees:

Les Hautes Parties Contractantes, tout en reconnaissant les garanties stipulées en faveur de la Suisse par les Traités de 1815, et notamment l'acte du 20 novembre 1815, garanties qui constituent des engagements internationaux pour le maintien de la paix. [The High Contracting Parties, while recognizing the guarantees stipulated in favor of Switzerland by the Treaties of 1815 and particularly the Act of November 20, 1815, guarantees which comprise international undertakings for the maintenance of peace].

SCHWEITZER, *supra* note 16, at 55. The word *Traités* [Treaties] clearly carries a plural denotation. Since the Article refers expressly to only one international law treaty, the *Acte portant reconnaissance*, the only other international transactions which would meet both requirements of having been concluded in 1815, and having been designed to offer a guarantee of a specific kind to Switzerland, would be the Declaration of Vienna coupled with the Swiss Diet's accession to the Convention on the one hand, and the Declaration of Vienna as embedded in the Final Act of the Congress of Vienna on the other. *See* ROBERT, *supra* note 25, at 63.

each inter-power concordat—the Declaration and the Act of recognition—as a *pactum in favorem tertii*.¹¹⁷

Finally, while some scholars have analogized the interactive swapping of undertakings and understandings to the notification/recognition model of neutralization,¹¹⁸ I suspect that too much Procrustean manipulation is demanded by the view that a unilateral Swiss neutrality was “notified” to the Great Powers at Vienna. The Swiss delegation was communicating a continuously-articulated traditional policy rather than a single publicly-uttered promissory declaration of *pro futuro* permanent neutrality, addressed to specific states and requesting a form of specific recognition.¹¹⁹ Moreover, the response of the Powers to the delegation’s representations was not to approve a provisional recognition among themselves, but to make a full recognition conditional upon the agreement of Switzerland to a realignment of frontiers. In other words, the Great Powers arrogated to themselves the roles of counter-promisors and recognizers, thereby scrambling the sequence of unilateral promise, notification, and unconditional recognition.¹²⁰

The Swiss people, using the instrument of popular referendum, have regularly

¹¹⁷ Literally, a “pact in favor of a third party.” See STRUPP, *supra* note 21, at 24. Treaties which stipulate rights for third parties are, however, controversial in international law because of the uncertainty of enforcement by the would-be beneficiary state. See O’CONNELL, *supra* note 18, at 247–48. One effect of the acceptance by the third party would be to deprive the contracting states of the power to renege on the granted privilege. See *id.* at 247. The disputed status of third-party treaties probably accounts for the use of other forms of neutralization—for example, custom—to confirm Switzerland’s status. The Swiss government itself, however, has embraced the Act of recognition as the legal fountainhead of neutrality. See *infra* note 120.

¹¹⁸ Thus, the instruments of 1815 did not purport to create the status of permanent neutrality for Switzerland, but arguably sought only to grant a recognition and a guarantee to what was obviously assumed to be an existing concept (none of the documents offered any definitional criteria of Swiss permanent neutrality). See Claudio Caratsch, *The Permanent Neutrality of Switzerland*, in NEUTRALITY AND NON-ALIGNMENT IN EUROPE 13, 14 (Karl E. Birnbaum & Hanspeter Neuhold eds., 1982). It could be hypothesized, therefore, that Switzerland’s unilateral declaration of permanent neutrality had been expressly notified to the Great Powers gathered at Vienna by the Swiss delegation, and that the Declaration of Vienna and the *Acte portant reconnaissance* represented multilateral recognition by the Great Powers of the Swiss unilateral position. See *id.*; see also Hummer, *supra* note 17, at 17.

¹¹⁹ But see *infra* text accompanying note 161 (discussing how multiple declarations contributed to a thin legal premise for Finnish neutrality).

¹²⁰ As already observed, the Swiss are prone to thinking that their permanent neutrality, at least since 1815, has the authority of custom. See *supra* text accompanying note 99. The official Swiss government view of the country’s neutralization, however, is that the elevation of permanent neutrality to an international status, where previously it had been unilaterally declared, is based upon the Act of November 20, 1815. See BLACK ET AL., *supra* note 73, at 22 (citing the *Conception officielle suisse*); see also Caratsch, *supra* note 118, at 14.

rebuffed the trend toward international solidarity and confederation in the postwar era.¹²¹ *The Economist* magazine referred to the Swiss experience as a “driven-snow variety” of neutrality which has even foreclosed membership of the United Nations.¹²² A recent Swiss government report on the future of neutrality, however, acknowledged the attenuation of Switzerland’s geostrategic role after the Cold War, as well as the powerful commercial seduction of the EU. The report included the remarkable concession, unprecedented in Swiss neutrality practice, that “[t]here is no room for neutrality where the world is faced with a state guilty of breaching the peace and seriously violating international law.”¹²³

2. *A Mixed-Form Neutralitization: Austria*

The political determinant of Austrian permanent neutrality was the struggle of Austria’s postwar leaders to find a plausible means of restoring and preserving the country’s independence even as it was being “sucked into the ‘strudel’ of growing East-West conflict,” to use Gerald Stourzh’s graphic description.¹²⁴ Stalin’s death in 1953 brought to power in the Soviet Union a collective leadership under Nikita Khrushchev which signaled its desire to improve contacts with the West through the policy it labeled “peaceful coexistence.”¹²⁵ Although Moscow had tied the status of Austria to the fate of a peace treaty with Germany, the Soviets in 1955 announced that, provided effective safeguards against a future *Anschluss* could be devised, and that Austria complied with the obligations of a military neutrality, the Soviet Union stood willing to conclude a “state treaty” restoring Austrian sovereignty and to withdraw its troops from Austria without delay.¹²⁶

¹²¹ See David Marsh, *Swiss Stop the Clock on Euro Integration*, FIN. TIMES, Dec. 7, 1992, at 2 (discussing Swiss rejection of free trade area linking Alpine and Nordic countries to the EU).

¹²² See *At the EEC’s Door*, ECONOMIST, Mar. 26, 1989, at 16, 16. The metaphor, while accurate in a technical sense, has unfortunate connotations ten years later in light of new revelations of Swiss complicity with the Nazi war economy. See *supra* note 3.

¹²³ *Switzerland and Europe: Time to Join Others?*, ECONOMIST, Nov. 28, 1992, at 51, 52.

¹²⁴ See GERALD STOURZH, *KLEINE GESCHICHTE DES ÖSTERREICHISCHEN STAATSVERTRAGES* [A SHORT HISTORY OF THE AUSTRIAN STATE TREATY] 9 (1975).

¹²⁵ See KONRAD GINTHER, *NEUTRALITÄT UND NEUTRALITÄTSPOLITIK* [NEUTRALITY AND NEUTRALITY POLICY] 95 (1975) (defining peaceful coexistence as “an ideological struggle with nonmilitary means, but moreover also through cooperation”).

¹²⁶ Here is one author’s perception of Molotov’s gesture:

The instruments of Austrian neutralization are messy and somewhat ambiguous, characteristics which undoubtedly helped the Austrian government in its post-1991 reassessment of the durability of its neutrality obligations. As in the case of Switzerland, Austria's permanent neutrality rests on a documentary trinity—a bilateral agreement, the Moscow Memorandum, signed in April 1955 between an Austrian government delegation and the Soviet Union;¹²⁷ the state treaty itself, ratified in 1955, among the four occupying Powers¹²⁸ and the Republic of Austria;¹²⁹ and a self-styled Constitutional Law on the Neutrality of Austria, adopted internally by the Austrian Parliament in October 1955, after the last foreign

There were strategic as well as diplomatic advantages for the Soviets in conceding Austria's neutralization at this time. For as well as conforming with the post-Stalin 'new look'—a diplomacy which was seeking a *détente* with Tito and improved relations with the Asian neutralists—there were strategic advantages for the Soviet Union in thus separating two NATO powers (Italy and West Germany) and seeing the Swiss-Austrian wedge of neutral territory hindering the logistic consolidation of NATO. And Austria's neutralization entailed the transfer of 5,000 American troops from Salzburg to south of the Brenner.

PETER LYON, *NEUTRALISM* 168 (1963). Confirming Lyons's precognition, a 1982 study noted how "the Austrian prohibition of military overflights during the 1958 Lebanon crisis and the 1973 Middle East war [were] examples of the problems created for the West by Austria's strategic position." William B. Bader, *Austria, the U.S. and the Path to Neutrality*, in *THE AUSTRIAN SOLUTION*, *supra* note 20, at 85, 95. The Soviet *renversement*, which by October 1955 had led to the departure of the last foreign soldier from Austrian soil, was so startling that a January 1984 *Time* magazine review of the state of current East-West relations cited it as the most auspicious signal displayed by the Soviet Union during the era of "peaceful coexistence." John Kohan, *The Vocabulary of Confrontation*, *TIME*, Jan. 2, 1984, at 42; *see also* Curt Gasteyger, *The Soviet Union and Swiss Neutrality*, in *EUROPEAN NEUTRALS*, *supra* note 10, at 156–57 (noting that Austrian neutrality advanced Soviet geopolitical objectives both in its early years, by "neutralizing" a potentially hostile neighbor, and later on, by keeping Austria out of a strengthening Western alliance).

¹²⁷ *Memorandum über die Ergebnisse der Besprechungen Zwischen der Regierungsdelegation der Republik Österreich und der Regierungsdelegation der Sowjetunion* [Memorandum on the Conclusions of the Meetings Between The Government Delegation of the Republic of Austria and the Government Delegation of the Soviet Union], Apr. 15, 1955, *reprinted in* STOURZH, *supra* note 124, at 164–67. The designation Moscow Memorandum was an invention of the Soviet news agency TASS. *See* Kunz, *supra* note 83, at 420 n.7.

¹²⁸ The Soviet Union, the United States, the United Kingdom of Great Britain and Northern Ireland, and France.

¹²⁹ The *Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich* [State Treaty for the Re-establishment of an Independent and Democratic Austria], May 15, 1955, *translated in* AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 96.

soldier had departed Austrian territory.¹³⁰ Under the Memorandum, the Austrian delegation undertook to ensure that the Austrian government would make a declaration in a form that would oblige Austria—internationally and in perpetuity—to practice a neutrality of the type maintained by Switzerland.¹³¹ The declaration would be submitted to the Austrian parliament, and international recognition of the declaration would be sought.¹³² Austrian diplomacy successfully excised all references to neutrality from the state treaty, evidently in order to avoid the impression of a “neutralization” in its more pejorative meaning of an imposed condition,¹³³ even though adoption of neutrality was patently the political price of securing Great Power unanimity on the long-deferred treaty to restore the independence of the Republic.¹³⁴ The later domestic law of neutrality comprised

¹³⁰ The *Bundesverfassungsgesetz über die Neutralität Österreichs* [Federal Constitutional Law on the Neutrality of Austria], Oct. 26, 1955, translated in AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 143. See Hanspeter Neuhold, *Background Factors of Austria's Neutrality*, in NEUTRALITY AND NON-ALIGNMENT, *supra* note 118, at 44, 47.

¹³¹ Josef Kunz, writing in 1956, believed it was a legal solecism for Austria to comply with its Moscow Memorandum commitment to “make a unilateral declaration which will bind it internationally.” Kunz, *supra* note 83, at 421. But Kunz himself went on to attribute the international legality of the declaration to the “series of steps” taken by Austria pursuant to the Memorandum, including the pledge to “obtain international recognition” of the declaration. Thus, the framers of the Memorandum must have contemplated the insufficiency of unperfected unilateral utterances. See *id.* In 1980, in his standard work on Austrian neutrality, Alfred Verdross discarded as “a moot point” the issue of whether Austria’s unilateral promise of neutrality *per se* could engage an international obligation. Verdross stated that although “in principle unilateral promises are indeed binding under international law, as the International Court of Justice pronounced in the two *Nuclear Tests* cases,” nevertheless, “[a]s . . . notification in the actual instance of the neutrality law was linked with the request for recognition, the assumption must be that Austria’s engagement under international law arose only from the acceptance of, or acquiescence in, the notification.” VERDROSS, *supra* note 23, at 30.

¹³² See *id.* at 29; see also Kunz, *supra* note 83, at 420. The Austrians also called for a “guarantee” by the occupying Powers of “the inviolability and integrity of the Austrian state territory.” VERDROSS, *supra* note 23, at 27. Responding, the Soviet Government expressed its willingness to “recognize the declaration concerning the neutrality of Austria,” and “to take part in a guarantee of the integrity and inviolability of the Austrian [s]tate territory by the four Powers.” *Id.* at 26–27.

¹³³ See *supra* note 73 (discussing “neutralization” as imposed status); see also Neuhold, *supra* note 130, at 47. The state treaty was prepared by a Conference of Ambassadors at Vienna in early May 1955, and signed at the Belvedere Palace in Vienna on May 15, 1955, by the Republic of Austria and by the Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and France—described collectively in the Treaty as the “Allied and Associated Powers.” See *id.*

¹³⁴ Austrian sensitivity to this question seemed to abate, however, after the fall of the Soviet Union. In 1995, Foreign Minister Wolfgang Schüssel warned that “Austria must stop being a

two brief articles, the first asserting that Austria declared permanent neutrality “of its own free will” and “[f]or the purpose of the permanent maintenance of external independence and . . . the inviolability of its territory,” and the second an undertaking by Austria “never in the future [to] accede to any military alliances nor permit the establishment of military bases of foreign [s]tates on its territory.”¹³⁵ The text of the law was notified to foreign governments with a request for recognition.¹³⁶

Austrian neutralization, therefore, could be plausibly analyzed as a purely unilateral (and revocable) act of municipal law,¹³⁷ as treaty-based, or as an example of the notification/recognition paradigm.¹³⁸ The treaty argument gains force from

passive spectator hiding behind neutrality *imposed* after the second World War.” GORDON BROOK-SHEPHERD, *THE AUSTRIANS: A THOUSAND-YEAR ODYSSEY* 448 (1997) (emphasis added). Schüssel, leader of the pro-NATO People’s Party, became Prime Minister of Austria in February 2000. See *infra* note 152 (discussing the Schüssel government’s security policy).

¹³⁵ AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 143.

¹³⁶ By the end of 1955, 37 states—including the four Allied and Associated Powers which had cosigned the state treaty—had complied with the Austrian government’s request for recognition, whether expressly (in the case of the four occupying Powers), or by taking note without objection, or by simply confirming receipt of the declaration of constitutional neutrality. See VERDROSS, *supra* note 23, at 31. By the time of the 20th anniversary celebrations of permanent neutrality in 1975, the Government had received recognition from over 75 states. See AUSTRIAN FEDERAL PRESS SERVICE: AUSTRIA TODAY AND TOMORROW 28 (1975). Further, it has been suggested that Austria’s unopposed admission to the United Nations in December 1955, encumbered by the status of permanent neutrality, amounted to a recognition by acquiescence on the part of the member states of the General Assembly, and created an implied compatibility between the Austrian status and the enforcement procedures of the world organization. See VERDROSS, *supra* note 23, at 33 (noting that the four Powers had consented in the preamble to the state treaty to support Austria’s application to the United Nations, creating an implied obligation not to draw Austria into compulsory enforcement measures that would violate neutrality). But the four Powers did not formally offer a guarantee of Austria’s neutrality, evidently for the precise reason that such a guarantee might conflict with their obligations under the U.N. Charter. See SUBEDI, *supra* note 78, at 145.

¹³⁷ See *At the EEC’s Door*, *supra* note 122, at 16 (“Austria is under no international obligation to remain neutral.”).

¹³⁸ A weakness of the notification/recognition paradigm is that the recognition element, in particular, is dependent on the form selected by recognizing third states, and there is no dominant form of recognition. Such indeed was the gravamen of a memorandum entitled *The Nature of Austria’s Neutrality and Legal Implications of the United States Response to the Neutrality Declaration*, which was dated November 16, 1955, and which was prepared by the Office of the Legal Adviser to the U.S. Department of State. The memorandum found that “a non-participating state may recognize a treaty of neutral[ti]zation or a declaration of self-neutral[ti]zation [*sic*] in the sense of declaring that as a matter of policy it will not violate the neutrality,” *but* that it had “no commitment to defend such neutral[ti]zation unless it has explicitly agreed to guarantee it.” See

the possible rule-generation power of the Moscow Memorandum.¹³⁹ The Memorandum was explicitly referred to in an annex to the state treaty, which notes the “arrangements” (the German text refers to *Vereinbarungen*, “agreements”) made in Moscow.¹⁴⁰ Moreover, Article 22(13) of the state treaty equates the Moscow Memorandum with an international treaty when it speaks of “rights and properties . . . which will be transferred to Austria by the Soviet Union in accordance with the Austro-Soviet Memorandum [*sic*] of April 15, 1955.”¹⁴¹ At the time when Austria declared its permanent neutrality by a constitutional law, therefore, it surely was not acting upon a purely unilateral impulse, with exclusively internal domestic law effects, but in accordance with a binding obligation which, as Kunz argued, “could not be changed or revoked, except with the consent of the Soviet Union,”¹⁴² and whose accomplishment would impose a collateral obligation on the Soviet Union to recognize Austrian permanent neutrality at the level of international law.¹⁴³ With respect to the Soviet Union, therefore, the neutralization of Austria occurred by international law treaty. Respecting all other states, it occurred by the sequence of unilateral declaration, notification, and recognition.¹⁴⁴

BLACK ET AL., *supra* note 73, at 49 (discussing memorandum). According to Cyril Black of Princeton University, the State Department was taking the view that “when the United States informed Austria in a Note dated December 6, 1955, that it ‘recognizes the perpetual neutrality of Austria,’ it was simply announcing its intention to refrain from taking actions that might violate Austria’s neutrality.” *Id.* at 49–50. In other words, the Note did not confer a legal recognition *per se* of the Austrian “self-neutrality,” an unusual terminology that in fact may have encouraged an impression of unilateral revocability.

¹³⁹ Some scholars, in fact, have argued that *only* an international treaty can accomplish an international law neutralization. See PICCIONI, *supra* note 104, at 7 (stating unequivocally that permanent neutrality is “necessarily treaty-based”); STRUPP, *supra* note 21, at 61.

¹⁴⁰ See AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 142. Technically, the reference to the Memorandum appears in an annex to the state treaty, but Article 36 of the treaty provided that the annexes were explicitly to have “force and effect as integral parts of [t]he state treaty.” *Id.* at 137. Nor should the reference to “arrangements” (or even “agreements”) be seen as negating the existence of a valid treaty: Article 2(1)(a) of the Vienna Convention on the Law of Treaties regards the precise designation of an international instrument as inconsequential to its validity as an international law treaty. For the text of Article 2 of the Vienna Convention, see 8 I.L.M. 679, 680–81 (1969); CARTER & TRIMBLE, *supra* note 87, at 50–51.

¹⁴¹ AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 112.

¹⁴² Kunz, *supra* note 83, at 421.

¹⁴³ “Only the Soviet Union is, by the Moscow Memorandum, legally bound to grant this recognition.” *Id.*

¹⁴⁴ Ermacora, while agreeing that the state treaty removed doubt as to the legal character of the Memorandum, nevertheless believed that by the time the treaty was signed the rule-creating power of the Memorandum had been exhausted, Austria having taken the necessary steps to declare, notify, and obtain “recognitions” of its permanent neutrality. See FELIX ERMACORA,

Since the collapse of the Soviet Union, Austrian government leaders have self-consciously cultivated doubt as to Austria's fidelity to the instruments of neutralization. The principal *legal* argument has been one of redundancy: German unity and the Soviet implosion stripped meaning from most of the state treaty's provisions (and abrogated any lingering effect of the Moscow Memorandum).¹⁴⁵ But the primary discourse has been one of political expediency rather than legal necessity. Former Foreign Minister, Peter Jankovitsch, spoke in mid-1992 of neutrality as a "flexible" concept that had to be adapted to political and military circumstances in Europe.¹⁴⁶ And when Federal President Thomas Klestil took office in July 1992, he justified departures from strict neutrality in the Gulf War by insisting that neutrality was not "an end in itself."¹⁴⁷

The end of Austria's bloc neutrality would inevitably have compelled either a fresh security premise for permanently neutral status or eventual abandonment of neutrality.¹⁴⁸ In the absence of pervasive security concerns, and under some

ÖSTERREICH'S STAATSVETRAG UND NEUTRALITÄT [AUSTRIA'S STATE TREATY AND NEUTRALITY] 108 (1957). While it is true that the obligations in the strict sense had been fulfilled, reference to the Memorandum is still demanded by the very fact that, rather than constituting merely "the first link in a chain of measures and resolutions which culminated in the recognition of Austria's permanent neutrality," as Verdross has maintained, the principles set forth at Moscow formed part of the normative foundation of Austrian permanent neutrality, and (even after the Soviet Union's demise) could still contribute to interpretation of that neutrality. See VERDROSS, *supra* note 23, at 29. Only the Memorandum expressly cited the Swiss model as a precedent, for example. See Article I(1) of the Moscow Memorandum, *reprinted in* STOURZH, *supra* note 124, at 164; *see also* Hummer, *supra* note 17, at 24.

¹⁴⁵ See Ian Traynor, *Austrians Ponder Neutrality's Role in a World Turned Upside Down*, GUARDIAN (Manchester), Oct. 23, 1990, at 10. Hanspeter Neuhold has proposed *clausula rebus sic stantibus* as the appropriate premise for Austria's withdrawal from its neutralization commitments. See Neuhold, *supra* note 14, at 254. The changed circumstances, in Neuhold's view, flowed from the "withering away" of the East-West conflict since the fall of the Soviet Union. See *id.* Neuhold relied also on a teleological reading of the instruments of neutralization. The purpose of supporting national security and independence was explicitly stated in the establishing constitutional law, *see supra* text accompanying note 135. See Neuhold, *supra* note 14, at 254.

¹⁴⁶ See EC: Austria Believes That Accession Negotiations Will Last Nine Months Maximum, REUTER TEXTLINE, July 3, 1992, at 1 (on file with author).

¹⁴⁷ See Otmär Lahodnysky, *The Changing Face of Austrian Neutrality*, NATO REVIEW, Dec. 1992, at 24, 24. Moreover, the Russian government indicated early in 1995, after Austria formally acceded to the EU treaties, that it would respect any decision Austria made about its defense, regardless of the terms of the 1955 State Treaty. See Denis Staunton, *Issue of Austria's Neutrality Again to the Forefront*, IRISH TIMES, Aug. 12, 1996, at 13, available in LEXIS, News, By Individual Publication, Irish Times File.

¹⁴⁸ "[T]he dissolution of the Soviet Union and of the Warsaw Pact system destroyed the political basis of neutrality Austria style." Frank Cede, *Does Europe End at the Urals?: The*

economic pressure, Austria joined the EU in 1995, liberated from earlier Soviet objections—premised on the state treaty—that permanent neutrality and EU membership were legally and politically incompatible.¹⁴⁹ By 1996, on the eve of an EU intergovernmental conference to consider further political integration, the Austrian government called for intensification of the EU's common foreign and security policy, including closer cooperation between the EU and its military adjunct, the Western European Union.¹⁵⁰ Moreover, as the Gulf War sparked a renaissance of collective security, the Austrian Parliament amended a statute that banned, in time of war, the import, export, and transport of military equipment, ammunition, and all types of weapons into or out of the region of combat operations; under the amendment, the ban would be lifted in order to implement decisions of the U.N. Security Council, and now remains in force only for nuclear, bacteriological, and chemical weapons.¹⁵¹ One writer, sympathetic to Austrian

Future of European Integration, Remarks by the Legal Advisor of the Austrian Federal Ministry for Foreign Affairs (Oct. 30, 1997), available in Austria, Austrian Press & Information Service, (last modified Nov. 4, 1997) <<http://www.austria.org/press/38.html>> [hereinafter *European Integration*].

¹⁴⁹ See *Austria and the EEC: Another Ireland?*, *ECONOMIST*, June 4, 1988, at 47.

¹⁵⁰ See Austrian Press & Information Service, *Austrian Thoughts on the 1996 Intergovernmental Conference of the European Union*, (visited Apr. 23, 2000) <<http://www.austria.org/press/policy1.htm>>; see also Austrian Foreign Minister Wolfgang Schüssel, *Europe's Security and the New NATO*, Address to the XVth International NATO Workshop (June, 1998) in XVth International Workshop On Political-Military Decision Making in the Atlantic Alliance (visited Apr. 23, 2000) <<http://www.cedr.org/98Book/workshop98.htm>> (making the remarkable statement that "obligations of international solidarity . . . take precedence over obligations of classical neutrality"). Foreign Minister Schüssel indicated Austria's support for integrating the Western European Union (WEU), a military organization, into the EU. *Id.* The WEU is considered further in Part IV, see *infra* text accompanying note 286.

¹⁵¹ The original ban had been legitimate under Hague Convention rules, even though it obviously affected *private* as well as state import and export, because it was intended to apply impartially to all future belligerents and theaters of war. See *supra* notes 23–24. Acting on the amendments without delay, the Austrian authorities authorized the passage of several trainloads of U.S. military equipment through Austrian territory. See 43 *CURRENT DIGEST SOVIET PRESS*, May 8, 1991 (No. 14), at 24. The Soviet press digest also conveyed official Soviet disapproval of this overturning of "military-strategic stereotypes," which occurred without any Security Council decision requiring Austrian cooperation. On the duty of cooperation with the U.N. Security Council, see *infra* text accompanying note 218; see also BROOK-SHEPHERD, *supra* note 134, at 445. The Austrian government had previously permitted overflights of American and British transport aircraft (without troops) prior to the Gulf War in 1991 en route to Saudi Arabia. See Traynor, *supra* note 145, at 10. All of these permissive interventions were in technical violation of classical neutrality rules on impartiality and prevention. See *supra* text accompanying notes 24, 26.

history, wrote of Austrian permanent neutrality in 1997 as having become “as impermanent as the Soviet Communism which had imposed it.”¹⁵²

3. *A Unilateral Form of Neutralitization: Finland*

None of the small European neutrals has been more geopolitically favored by the collapse of the Communist Bloc than Finland. The origin of Finnish neutrality is explicitly tied to management of relations with its immense and threatening neighbor to the east, the Soviet Union.¹⁵³ Thus, the sole formal instrument of Finnish neutralitization was a preambular reference in a treaty of mutual assistance that the Finns signed with the Soviets in 1948 as their price for continued sovereignty.¹⁵⁴ Nevertheless, by applying the *Nuclear Tests* model of unilateral neutralitization, Finnish permanent neutrality, at least until Finland’s absorption into the EU in 1995, acquires a plausible (if concededly thin) foundation in international law.

¹⁵² BROOK-SHEPHERD, *supra* note 134, at 448. The new Austrian Federal Government which took office in February 2000 is a pro-NATO coalition of the People’s Party and the far-right Freedom Party. The coalition’s joint manifesto commits the new government to adopting a guarantee of mutual assistance among the EU member states, to redrafting the federal constitutional law on neutrality, *see supra* text accompanying notes 130–31, and to removing any obstacle to full participation in the evolving EU common security and defense arrangements. *See* Austrian Press & Information Service, *Austria: Foreign and Security Policy*, (visited Apr. 23, 2000) <<http://www.austria.org/newgovt2.html>>. NATO membership is also explicitly noted as a future option. *See id.* It appears, therefore, that the government envisages a “split personality” for Austrian security: At least until the achievement of full NATO membership, Austria would abandon permanent neutrality within the EU and maintain it vis-à-vis all non-EU members. One caveat, however, is that the new government pledges to hold a national referendum before implementing these sweeping changes in Austria’s security profile. *See id.*

¹⁵³ Urho Kekkonen described the policy in his book, *A President’s View*:

During his term as Prime Minister after the war, Paasikivi [former President of Finland] had to endure a speech in which a certain member of parliament sharply criticized the Government’s foreign policy. When Paasikivi finally managed to get a word in, he urged the deputy to go home, take out a map and look where Finland was situated. That advice remains useful to one and all to this very day.

URHO KEKKONEN, *A PRESIDENT’S VIEW* 16 (1982). Urho Kekkonen was President of Finland from 1965 to 1981. His subject here was the foreign policy of his predecessor and mentor, former President J.K. Paasikivi, a policy adhered to with such constancy by Kekkonen that it became known as the “Paasikivi Kekkonen Line.” *See* WOKER, *supra* note 13, at 29.

¹⁵⁴ *See* Treaty of Friendship, Co-Operation and Mutual Assistance Between the Union of Soviet Socialist Republics and the Republic of Finland, Apr. 6, 1948, U.S.S.R.-Fin., 48 U.N.T.S. 156 [hereinafter 1948 Treaty Between the U.S.S.R. and Finland].

In the immediate postwar period, Finns would hardly have been surprised had their country found itself dragged into the Soviet Union's ring of satellites. In the icy climate of geopolitics that prevailed, Stalin conveyed his request that a reciprocal defensive treaty, similar to those contracted by the Soviets with other states on its Western approaches, Bulgaria, Hungary, and Romania, should be concluded between Finland and the Soviet Union.¹⁵⁵ The 1948 treaty—eventually denounced by Finland in 1992—cast a long postwar shadow on Finland's pretensions to authentic neutrality. The terms of the treaty were simply not compatible with an unfettered sovereign right to choose classical neutrality in the wars of other states. Article 1 required Finland, if the Soviet Union were attacked through Finland by Germany or a German ally, to repel the aggression with all of the forces at its disposal, "with the help, if necessary, of the Soviet Union or together with the Soviet Union."¹⁵⁶ Article 2 required peacetime consultations between the parties if a military threat were identified.¹⁵⁷ Permanent neutrality keeps its adherents out of wars; under this treaty, Finland would have been coerced to the Soviet side of a Soviet-German conflict from the outset. Apologists for the treaty portrayed it as a "prop" for the primary duty of prevention, with which all neutral states must comply.¹⁵⁸ In reality, however, the treaty was more correctly a

¹⁵⁵ See D.G. KIRBY, *FINLAND IN THE TWENTIETH CENTURY* 165–66 (1979). The typical postwar security treaties imposed by the Soviet Union on its satellites would apply in a general state of hostilities with Germany. Thus, if the Soviet Union were invaded by Germany through, say, Poland, Romania would be automatically involved in the conflict. The NATO and Warsaw Pact alliances both contained these features of "automaticity" that Finland was anxious to avoid. See *infra* text accompanying note 217 (discussing assistance obligations of the NATO partners).

¹⁵⁶ 1948 Treaty Between the U.S.S.R. and Finland, Apr. 6, 1948, U.S.S.R.-Fin., 48 U.N.T.S. 156, 158.

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* text accompanying note 26 (discussing duty of prevention); see also MAX JAKOBSON, *A STUDY OF FINNISH FOREIGN POLICY SINCE THE SECOND WORLD WAR* 91 (1968). In Jakobson's analysis, affirmed by Kekkonen, the treaty only committed Finland to the defense of its own territory, which the duty of prevention would require a neutral to undertake in any event. See *id.* at 49; URHO KEKKONEN, *NEUTRALITY: THE FINNISH POSITION* 184 (1973). The question of obtaining Soviet military assistance would only arise after Finland had been attacked, and consequently only if the Finnish effort to stay out of the war had collapsed and its neutrality had been violated. In those circumstances a neutral state would have the right to receive assistance from such powers as are willing to grant it, and the treaty provided a guarantee *in extremis* of military reinforcement by the Soviet Union of Finland's defense of its neutrality. See JAKOBSON, *supra*, at 49; see also KEKKONEN, *supra*, at 185. If the Soviet Union became involved in a war that did not touch the territory of Finland, the Finnish commitment under the 1948 treaty would have been limited to the usual neutral obligation (recognized in the treaty) of staying out of alliances directed against the Soviet Union. See JAKOBSON, *supra*, at 49. George Maude, in his definitive study of Finnish neutrality, referred to the "strange obligation" for a neutral to defend a great

documentary reflection of Finlandization, the posture of supine submission that Max Jakobson and others regarded as a "character assassination" of the Finns in the postwar era.¹⁵⁹

As a matter of procedural neutralitization, however, the 1948 treaty did offer a fragile legal underpinning to Finnish permanent neutrality through its preambular reference to "Finland's endeavo[u]rs not to be involved in clashes between the interests of the [G]reat Powers."¹⁶⁰ The mere mention in an international treaty of the substance of Finland's purported new foreign policy orientation, in fact, always distinguished the Finnish status of neutrality from the self-anointed experience of Sweden. In addition, and despite the burden of the treaty, former Finnish president Urho Kekkonen embarked on an international explanatory mission from 1959 to 1962 to collect endorsements of Finnish neutrality from the governments of Britain, Austria, the United States, and France.¹⁶¹ Professor Jan-Magnus Jansson of the University of Helsinki argued that the string of declarations accumulated by Kekkonen in these explanatory missions of 1961–62 had "no legal force,"¹⁶² and indeed the phraseology used did seem to reveal a studied political, rather than legal, tone. The British government, for example, expressed its "understanding" of the Finns' policy, while the United States issued a communiqué undertaking to "scrupulously respect Finland's chosen course."¹⁶³ Nevertheless, the fusion of a specific treaty-based declaration of future neutrality with statements of understanding by foreign powers allowed Kekkonen to achieve at least a hybridization of unilateral permanent neutrality (as derived from the *Nuclear Tests* decisions), and the notification/recognition model adopted by Austria.¹⁶⁴ Although

power, and was unpersuaded by Jakobson's careful apologetics. See GEORGE MAUDE, *THE FINNISH DILEMMA: NEUTRALITY IN THE SHADOW OF POWER* 67 (1976); see also LYON, *supra* note 126, at 97–98 (expressing a similar sentiment).

¹⁵⁹ See Max Jakobson, *Substance and Appearance: Finland*, 58 FOREIGN AFF. 1034, 1035 (1980).

¹⁶⁰ 1948 Treaty Between the U.S.S.R. and Finland, Apr. 6, 1948, U.S.S.R.-Fin., 48 U.N.T.S. 156, 156. See STEPHAN VEROSTA, *DIE DAUERENDE NEUTRALITÄT [PERMANENT NEUTRALITY]* 35 (1967); see also SCHWEITZER, *supra* note 16, at 40; Hummer, *supra* note 17, at 8–9.

¹⁶¹ In this way, Kekkonen hoped to convert what Finnish security commentator Harto Hakovirta described as an "asymmetrical" neutrality into a "symmetrical" neutrality accepted by East and West. See MAUDE, *supra* note 158, at 64–65.

¹⁶² See Jan-Magnus Jansson, *Preface to KEKKONEN*, *supra* note 158, at 9, 16.

¹⁶³ KEKKONEN, *supra* note 158, at 89.

¹⁶⁴ This would be a curious hybridization, since unilateral permanent neutrality seems to tolerate an open-ended circle of recognizing—and, hence, enforcing—states, while neutralitization by the Austrian model limits the circle to states which expressly participate in the neutralitization sequence. Further, because unilateral permanent neutrality does appear to entertain the possibility of future revocability, that option will have been closed out for Finland by the receipt of

Finland never issued a specific unilateral declaration of the kind that served as a catalyst for the Austrian procedure, Finland's adherence to permanent neutrality developed through a succession of foreign policy pronouncements by incumbent presidents, efforts to secure a reliable armed neutrality, and nonparticipation in military alliances (a duty originally based on the preambular formula of the 1948 Treaty).¹⁶⁵ And, unlike Sweden, the Finnish government actively sought to convince international opinion that its policy of neutrality was not subject to unilateral reassessment or abandonment.¹⁶⁶

Finnish permanent neutrality in the 1990s is no longer hard-wired to the Fenno-Soviet assistance treaty, which was abrogated in November 1991.¹⁶⁷ Russia has not insisted upon any conditions of neutrality or military assistance in considering its future relations with its smaller neighbor.¹⁶⁸ Thus, having long professed that it could never join the EU because of its neutrality,¹⁶⁹ Finland did so in 1995. Eventual

international law recognitions. If the objection is raised that the states which responded to Kekkonen's notification did not intend their recognitions to carry legal consequences, as Professor Jansson contended, but without argument, see Jansson, *supra* note 162, at 16, the point can be made with equal force that in the case of the Austrian neutralization only the Soviet act of recognition was unequivocally traceable to a binding obligation in international law, namely, the terms of the Moscow Memorandum. See Kunz, *supra* note 83, at 421 (asserting that only the Soviet Union, through the Memorandum, was legally bound to grant this recognition). In any event, the recognition received by Finland from the two Germanies was securely enclosed within mutually binding international instruments. See MAUDE, *supra* note 158, at 81.

¹⁶⁵ See KIRBY, *supra* note 155, at 208–09.

¹⁶⁶ An international law anchoring of Finnish neutrality has been a persistent problem for scholars. See Peter Bruckner, *Finland's Neutrality and the Economic Integration of Europe*, 83 AM. J. INT'L L. 447, 448 (1989) (reviewing TONI MUOSER, FINNLANDS NEUTRALITÄT UND DIE EUROPÄISCHE WIRTSCHAFTSINTEGRATION [FINLAND'S NEUTRALITY AND EUROPEAN ECONOMIC INTEGRATION] (1986)) (noting ironic centrality of Fenno-Soviet treaty to international acceptance of Finnish neutrality).

¹⁶⁷ See Subedi, *supra* note 2, at 248.

¹⁶⁸ See *id.* A new agreement with the Russian Federation, signed on January 20, 1992, contained none of the threatening security provisions of its predecessor. See Treaty Between the Republic of Finland and the Russian Federation Concerning Basic Relations, U.N. Doc. TR/201092/I-29173 (1992) (copy on file with U.N. Treaties Office). Article 4 of the treaty, dealing with security provisions, did contain a commitment to assist a party which became the object of armed aggression, but only in accordance with "the principles and provisions" of the U.N. Charter. See *id.*

¹⁶⁹ See Esko Antola, *Finland and West European Economic Integration*, in EUROPEAN NEUTRALS, *supra* note 10, at 89, 94 (citing official Finnish government statements that explicitly ruled out EU membership as incompatible with neutrality); see also Colin McIntyre, *Austria Faces Neutrality Obstacle to EC Entry*, REUTERS LIBR. REP. May 4, 1989, at 1 (reporting similar comment by former Finnish President Mauno Koivisto) (on file with author).

Finnish participation in NATO—and the formal end of its neutrality policy—were predicted by a U.S. congressional security analysis in 1996.¹⁷⁰

4. *Political Neutralitization: Sweden and Ireland*

a. *The Policy of the Free Hand: Sweden*

Sweden's neutrality has no formal instruments of neutralitization, but a long chain of historical evidence connects Swedish neutrality to the time of the Congress of Vienna in 1815, and in particular to a letter of King Karl Johan XIV to British Prime Minister Lord Palmerston, in which the King made the following seminal declaration: "My policy will be strict neutrality as long as I can preserve it."¹⁷¹ Sweden has entertained vociferous internal debate on the ramifications of that constantly reiterated policy for such issues as entry to the League of Nations,¹⁷² membership of the United Nations,¹⁷³ the paradox of possessing and developing nuclear weapons while preaching international peace,¹⁷⁴ the defense spending cutbacks of the early 1970s,¹⁷⁵ and recently the highly-charged question of the intensity of relations to be developed with the EU.¹⁷⁶ And the direction of Sweden's

¹⁷⁰ See Stanley R. Sloan, Congressional Res. Serv. Rep., *NATO Enlargement and the Former European Neutrals* (visited Apr. 25, 2000) <www.fas.org/man/crs/crs2.htm>.

¹⁷¹ JERRY WILSON RALSTON, *THE DEFENSE OF SMALL STATES IN THE NUCLEAR AGE: THE CASE OF SWEDEN AND SWITZERLAND* 49 (1969).

¹⁷² See Ian Ronald Barnes, *Swedish Foreign Policy, A Response to Geopolitical Factors*, 4 *COOPERATION & CONFLICT* 243, 259 (1974). On Swedish support for the League of Nations system of collective security, and preparedness to move from a posture of neutrality to participate in that system, see Wahlbäck, *supra* note 3, at 117–18.

¹⁷³ In the context of U.N. participation, former Swedish foreign minister Östen Undén made a frank statement to the Riksdag: "We are willing to join in a common security organization and in the case of a future conflict to relinquish our neutrality to the extent demanded by the statutes of the organization." RALSTON, *supra* note 171, at 72.

¹⁷⁴ Legally neutralitized states are under no specific obligation in peacetime to refrain from supplying war materials to third countries. Their peacetime duty is to refrain from entering into agreements that will require them to furnish this kind of assistance in future wars. See *supra* text accompanying note 58.

¹⁷⁵ Barnes noted that Sweden eventually came to rely on the so-called NATO nuclear umbrella as a critical element of its defense preparations. See Barnes, *supra* note 172, at 258–59.

¹⁷⁶ See generally MARGARETHA LISEIN-NORMAN, *LA SUÈDE FACE À L'INTÉGRATION EUROPÉENNE [SWEDEN CONFRONTS EUROPEAN INTEGRATION]* (1978) (presenting a comprehensive study of Sweden's application to join the EU).

economic relations with Nazi Germany has recently resurfaced as a matter of national discomposure.¹⁷⁷

There has been, in sum, a motif of neutrality in Swedish history since the Congress of Vienna. The golden thread of this motif is a formula that has acquired almost an incantatory value in Swedish foreign policy: "It is normally said that Sweden is not allied in peace, in order to remain neutral in war."¹⁷⁸ And yet, unlike the Swiss and Austrian (and to some extent Finnish) experiences, there is no single point along that continuum of history—early or late—when the mannerisms of neutrality were suddenly held in check, pulled together, and formally captured in a binding instrument of international law. In other words, Sweden's pretension to a status of permanent neutrality—if that indeed is the country's political condition—has never been formalized by the reciprocity and mutuality that typifies neutralization by treaty or by notification and recognition. Moreover, since the time of the Congress of Vienna, the Swedish government has officially regarded international law recognition as both unnecessary and undesirable.¹⁷⁹ Michael Schweitzer has described Swedish neutrality using the cogent expression, *Politik der freien Hand*, "the policy of the free hand."¹⁸⁰ Schweitzer drew the logical conclusion that such a policy could only have been deliberately calculated to stifle a potential *opinio juris* among the international community of states regarding the status in international law of Swedish neutral behavior.¹⁸¹ A free hand policy not only sabotaged the possibility of a neutralization by custom,¹⁸² it also prevented

¹⁷⁷ See Wahlbäck, *supra* note 3, at 120–21.

¹⁷⁸ Nils Andrén, *The Neutrality of Sweden*, in NEUTRALITY AND NON-ALIGNMENT, *supra* note 118, at 111, 113.

¹⁷⁹ The motivation for this unequivocal stance was explained by foreign minister Östen Undén in a speech to the Swedish parliament in 1964, which included the following key passage:

[I] can recall a stand taken in the [parliament] several years ago when it was proposed that negotiations should be opened with certain countries with a view to having them 'guarantee and respect' Swedish neutrality. To this the [parliament] declared with the backing of the votes of all the democratic parties that acceptance of the proposal would permanently fetter Sweden's foreign policy, and would moreover put it under the guarantee of several other powers. The [parliament] did not want to have anything to do with the proposal because in particular it would have meant putting ourselves under the protection of other powers and inviting them to judge how we implement our own foreign policy.

RALSTON, *supra* note 171, at 69.

¹⁸⁰ SCHWEITZER, *supra* note 16, at 43.

¹⁸¹ See *id.*

¹⁸² Hummer suggested that Swedish neutrality was the archetypal example of the *Sein/Sollen* (is/ought) confusion, which brackets subjective and unstable foreign policy maxims—what

an ascription to Sweden of the kind of unilateral manifesto that could create legal effects under the *Nuclear Tests* doctrine.¹⁸³

Sweden's policy of neutrality, then, appears to be entirely a flexible expression of an opportunistic state policy, which could be dispensed with or curtailed if a different option, or modulation, would better guarantee Sweden's national security.¹⁸⁴ No foreign power could object—at least not on any foundation of international law—to such a *bouleversement de politique*.¹⁸⁵ In the words of former Swedish Prime Minister Olof Palme in March 1972, as the debate on relations with the (then) European Communities reached fever pitch, “neutrality should not be considered as an ideology, but as a means for attaining certain objectives.”¹⁸⁶

Sweden, in other words, always espoused the pragmatic, discretionary approach

Hummer called “factual” permanent neutrality—with the objective modes of neutralization of the international law institution of permanent neutrality. See Hummer, *supra* note 17, at 9; see also *supra* note 102.

¹⁸³ See *supra* Part III.A.2.c (discussing *Nuclear Tests* jurisprudence).

¹⁸⁴ See Penny-Marie Kartos, *Sweden—Application for European Community Membership—Sweden Fears Loss of Policy of Neutrality with Community Membership*, 22 GA. J. INT'L & COMP. L. 673, 674 (1992); see also John Redmond, *The Wider Europe: Extending the Membership of the EC*, in 2 THE STATE OF THE EUROPEAN COMMUNITY: THE MAASTRICHT DEBATES AND BEYOND 209, 215 (Alan W. Cafruny & Glenda G. Rosenthal eds., 1993) [hereinafter THE STATE OF THE EUROPEAN COMMUNITY]; Carl-Einar Stålvant, *A Swedish View of 1992 and Swedish Neutrality Policy in a Changing Europe*, in EUROPEAN NEUTRALS, *supra* note 10, at 109, 124 (noting that Swedish thinking on neutrality has rarely taken account of the international law dimension, and has been primarily a deeply rooted mannerism of foreign policy).

¹⁸⁵ In fact, the Swedes showed little compunction about tampering with their “alliance-free” neutrality when in 1948 they floated the idea of a pan-Scandinavian military compact, which would have involved defensive commitments by the participating states *inter se*, while preserving a comprehensive neutrality vis-à-vis all nonparticipating states. See *infra* note 368, discussing “zones of peace.” The plan collapsed when the Norwegians began to tilt toward the emerging NATO alliance system, and to press for the Scandinavian model to become more Western-oriented. See WOKER, *supra* note 13, at 85. In his concluding remark about the ill-fated project, Woker caught the distinction between the legally conditioned behavior of the neutralized states, and the flexible politically conditioned behavior of Sweden's policy of neutrality:

It was a question of . . . an attempt made in the context of the then prevailing circumstances to give greater range to [Sweden's] neutral behavior, which certainly contradicted the letter of strict neutrality, but not the rationale underlying the Swedish policy. In that regard it should not be forgotten, that Sweden has resisted an international law fixation of its neutrality.

Id. at 85.

¹⁸⁶ LISEIN-NORMAN, *supra* note 176, at 7. For an account of Sweden's latest (successful) application to join the EU, see Kartos, *supra* note 184, at 679.

to neutrality that appears to have galvanized the Austrian government in the wake of the 1989–91 revolutions. It was unsurprising that Sweden offered to modify its neutrality policy in its latest negotiations with the EU.¹⁸⁷ The policy of the free hand, by definition, permits tacking to the prevailing political winds. It is a matter of no little irony, therefore, that by the time of the 1996 intergovernmental conference on the future of the Union, Sweden broke ranks with its fellow member neutrals and retrenched into opposition to the Western European Union and to a common EU defense. The Swedish government, in its preconference submission, asserted the country's traditional neutrality and its intention to stay out of all military alliances.¹⁸⁸

b. A Contingent, Negotiable, and Reactive Neutrality: Ireland

Ireland's neutrality has had few moments of high clarity, but they are conspicuous in Irish history and they accord it whatever margin of political coherence it may still claim. Although intimations of future neutrality are found as early as the Boer War, when Irish nationalists opposed Ireland's participation in a "British" war and campaigned against recruitment to the British army,¹⁸⁹ its

¹⁸⁷ See Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1161 (1995) (noting the concern of the European Commission, the EU's executive body, that "specific and binding assurances" might be needed to ensure Sweden's participation in the common foreign and security policy).

¹⁸⁸ See EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR RESEARCH, POLITICAL & INSTITUTIONAL AFFAIRS DIVISION (INTERGOVERNMENTAL CONFERENCE TASK FORCE), 2 EUROPEAN PARLIAMENT INTERGOVERNMENTAL CONFERENCE TASK FORCE, WHITE PAPER ON THE 1996 INTERGOVERNMENTAL CONFERENCE: SUMMARY OF POSITIONS OF THE MEMBER STATES OF THE EUROPEAN UNION WITH A VIEW TO THE 1996 INTERGOVERNMENTAL CONFERENCE 150–56 (J. Xavier Fernandez ed., 1996), available in <<http://www.europa.eu.int/en/agenda/igc-home.htm#al>> (visited Mar. 25, 2000) [hereinafter 1996 EU WHITE PAPER]. The complex demands of EU membership have created a fracturing of domestic consensus on neutrality within each of the EU member neutrals. In Sweden, for example, the government's assertiveness on neutrality in its 1996 submission was not shared by the main opposition party, which called for eventual NATO membership. See Bertrand Benoit, *Objections to NATO Links Weaken in New EU States*, IRISH TIMES, Aug. 29, 1997, at 14, available in LEXIS, News Library, Irish Times File. It would be premature, therefore, to interpret the 1996 Swedish position as the inaugural moment of a new unilateral permanent neutrality.

¹⁸⁹ See FISK, *supra* note 42, at 64. In fact, the neutralization of a future independent Ireland had been intermittently supported by nationalist leaders from Sir Roger Casement in 1913 to Éamon de Valera in 1920 and 1927. See PATRICK KEATINGE, A PLACE AMONG THE NATIONS 38 (1978). Keatinge described "an instinctive Irish predilection for neutrality" that severely constrained the choices open to later leaders. See *id.*

projection as formal policy had to await Irish independence and a sovereign choice of neutrality in World War II. In 1939, following the effective collapse of the League of Nations, Irish Prime Minister Éamon de Valera redefined the national interest unilaterally to provide for independence of action.¹⁹⁰ “The small states in Europe have begun to provide for their own defen[s]es,” de Valera announced in June 1936, adding “We must be neutral.”¹⁹¹ Ireland’s neutrality was formally declared by de Valera in parliament on September 2, 1939, the day before Chamberlain announced Britain’s declaration of war against Nazi Germany.¹⁹²

If wartime Irish neutrality had an undertone of anti-British nationalism, as some have alleged,¹⁹³ that animus became pronounced in the aftermath of the conflict. The establishment of NATO was the occasion for a tart exchange of notes between the United States and Ireland. Responding to the U.S. *aide-mémoire* soliciting Ireland as an original signatory to the North Atlantic Treaty, the Irish foreign minister, Seán MacBride, drew a sharp distinction between the laudable aims of the proposed treaty and the military means it envisaged. MacBride’s distinction did not focus on any perceived legal impediment to Irish adhesion to a military alliance. His premise was resolutely parochial:

¹⁹⁰ De Valera was bitterly disappointed by the failure of the League, which he characterized as “debris” when its sanctions policy against Italy failed in 1939. See T. RYLE DWYER, *IRISH NEUTRALITY AND THE U.S.A. 1939–47* 23 (1977). Ireland had played a significant role in the League, as a small postcolonial nation supporting the multilateral security framework that was the League’s signature. The presidency of the League passed by rotation to Ireland in 1932, and de Valera seized the opportunity of his inaugural address to dispense with the customary anodyne exhortations, and to spotlight what he called the “lip service” being paid to “the fundamental principles on which the League is founded.” NORMAN MACQUEEN, *IRISH NEUTRALITY: THE UNITED NATIONS AND THE PEACEKEEPING EXPERIENCE 1945–1969*, at 8 (1981).

¹⁹¹ Conor Cruise O’Brien, *Ireland in International Affairs*, in CONOR CRUISE O’BRIEN *INTRODUCES IRELAND* 104, 115 (Owen Dudley Edwards ed., 1969). According to Robert Fisk, in his definitive study of Irish wartime neutrality published in 1983, “[t]he failure of collective security brought about an introverted perspective which defined [Ireland’s] continued independence—and the future unity of Ireland—as the governing principles in all matters of foreign affairs.” FISK, *supra* note 42, at 59.

¹⁹² See *id.* at 89–90.

¹⁹³ Irish historian F.S.L. Lyons commented wryly that “to be free to choose between peace and a British war demonstrated to all the world just how complete [Irish] independence really was.” F.S.L. LYONS, *IRELAND SINCE THE FAMINE* 548 (1971). De Valera tenaciously declined the implorations of the British during the war for access to the former British naval facilities that had been transferred to Irish control in 1938. In the Irish Government’s *aide-mémoire* on the ports (and on British air force sorties in Irish airspace), specific reference was made to the terms of the various Hague Conventions. See FISK, *supra* note 42, at 91; see also Bitzinger, *supra* note 62, at 2 (describing Irish neutrality in a recent survey as “almost totally reactive and anti-British”).

[A]ny military alliance with, or commitment involving military action jointly with, the State that is responsible for the unnatural division of Ireland, which occupies a portion of our country with its armed forces, and which supports undemocratic institutions in the north-eastern corner of Ireland, would be entirely repugnant and unacceptable to the Irish people.¹⁹⁴

The unspoken postulate of MacBride's reply, therefore, was that Ireland had no *political* objection, and anticipated no *legal* obstacle, to Irish participation in a military alliance that was explicitly dedicated to the defense of Western democracy, but only if the "undemocratic" occupation of Ireland were terminated.¹⁹⁵

Ireland's peripheral strategic value, and its secure place within the Western democratic bloc,¹⁹⁶ meant that it did not become involved in the postwar political

¹⁹⁴ *Aide-mémoire* of the Government of Ireland to the Government of the United States, Feb. 8, 1949, reprinted in GOVERNMENT OF IRELAND, TEXTS CONCERNING IRELAND'S POSITION IN RELATION TO THE NORTH ATLANTIC TREATY (Pub. L. No. 9934), Apr. 26, 1950, at 5 [hereinafter IRISH NATO TEXTS].

¹⁹⁵ Resisting MacBride's transparent linkage of the NATO and partition questions, the U.S. State Department verbally informed the Irish Ambassador in Washington that the North Atlantic Treaty "was not a suitable framework within which to discuss problems which were 'entirely the concern of the Governments of Ireland and of the United Kingdom.'" Verbal Communication from the U.S. State Department to the Irish Ambassador, Mar. 31, 1949, reprinted in IRISH NATO TEXTS, *supra* note 194, at 7. This view was repeated in a State Department *aide-mémoire* of June 3, 1949, *see id.* at 10–11, that replied to a further note from MacBride dated May 25, 1949, in which he referred to reunification as "the sole obstacle to Ireland's participation in the Atlantic Pact." IRISH NATO TEXTS, *supra* note 194, at 10. On returning to power in 1953, de Valera had endorsed the MacBride strategy on NATO, noting that "so long as [p]artition exists it would not be possible for an Irish Government to enter into the Atlantic Pact." MACQUEEN, *supra* note 190, at 51. Curiously, the architect of Irish neutrality then allowed that partition was "a fundamental disturbing factor and it has to be put out of the way before we can get the normal reaction here." *Id.* The "normal reaction" for Ireland, the Prime Minister implied, would have been to accede to NATO.

¹⁹⁶ See Brian Lenihan, *Ireland and Neutrality*, Address by the Irish Minister for Foreign Affairs, in IRIS NA ROINNE GNÓTHAÍ EACHTRACHA [BULLETIN OF THE DEPARTMENT OF FOREIGN AFFAIRS] No. 972 (Dec. 1980/Jan. 1981) (noting that Ireland shared "the basic democratic, political and economic values with our neighbo[u]rs in Europe"). As Ireland would later make clear at the United Nations, the country was ideologically committed to strengthening the influence of "the group comprising the United States of America, Canada, and Western Europe." Liam Cosgrave, Address by the Irish Minister for External Affairs, in 159 DÁIL DEB., col. 144 (July 3, 1956). Irish support of anticolonialism, for example, stopped well short of automatic endorsement of Soviet-backed liberation movements. See MACQUEEN, *supra* note 190, at 97. In the later 1960s, the Irish government drew much domestic criticism for its silence on the Vietnam War, in marked contrast to Sweden's stridency. See PATRICK KEATINGE, A SINGULAR STANCE: IRISH NEUTRALITY IN THE 1980s, at 96 (1984).

restructuring that produced the neutralizations of Austria and Finland. As with all of its fellow European neutrals, the decisive postwar compass point for Ireland's neutrality was the emergent European Economic Community (EEC).¹⁹⁷ Unlike the other neutrals, however, Ireland's initial application to the EEC (in 1961), and its later successful application a decade later, were each premised on full membership. According to political scientist Trevor Salmon (writing in 1982), Ireland's courtship with the EEC "demonstrat[ed] the restrictions which economic dependence upon Britain placed upon Ireland, and the economic Achilles heel of an independent, neutral foreign policy."¹⁹⁸ De Valera's successor, technocrat Seán Lemass, told parliament in a cryptic statement in January 1962 that Ireland's United Nations role "may be affected in some degree following on our membership of the European Community."¹⁹⁹ Lemass was telegraphing the close of the period of neutrality as probably the major definitional component of Irish foreign policy—its desanctification, according to Salmon.²⁰⁰ Irish government leaders after de Valera

¹⁹⁷ See *infra* note 228 (explaining the EU's institutional evolution and treaty nomenclature). Ireland, however, had been admitted to the United Nations in 1955, ironically as part of a package deal which grouped Ireland with other pro-Western applicants. See MACQUEEN, *supra* note 190, at 91. The Irish Government did not explain the inconsistency of its readiness to join Britain in adherence to the U.N. Charter, which has a collective security system that arguably amounts to a global military alliance, in contrast to its partitionist justification for staying outside NATO six years earlier. See *infra* text accompanying note 223 (discussing alliance features of the United Nations). Moreover, at the time of Ireland's first application in 1946, there had been some parliamentary unease about the viability of Irish neutrality inside the new world organization. See MACQUEEN, *supra* note 190, at 84. By 1955, the failure of the second experiment in collective security was painfully obvious, and recently neutralized Austria was admitted simultaneously with Ireland. See *supra* note 136. The world organization gave Ireland once again the kind of multilateral platform that inevitably allows small nations to showcase geopolitical opinions that otherwise would be ignored. See *Tribute to Frank Aiken*, in IRIS NA ROINNE GNÓTHAÍ EACHTRACHA [BULLETIN OF THE DEPARTMENT OF FOREIGN AFFAIRS] No. 970 (Oct. 1980) (discussing Irish disarmament proposals). Ireland also was among the so-called middle powers which were invited to support Secretary General Dag Hammarskjöld's "blue helmet" alternative to collective security, the U.N. interpository peacekeeping missions that evolved after the Suez crisis. See generally Erik Suy, *United Nations Peacekeeping System*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 5, at 258, 264 (discussing origin and history of U.N. peacekeeping).

¹⁹⁸ Trevor C. Salmon, *Ireland: A Neutral in the Community?*, 20 J. COMMON MKT. STUD. 205, 209–10 (1982).

¹⁹⁹ MACQUEEN, *supra* note 190, at 149. As MacQueen concluded from his scrutiny of Irish parliamentary debates in the immediate aftermath of Ireland's first EU application in 1962, "[i]t was evident . . . that [Prime Minister Lemass] wished to avoid any binding commitment to the continuation of formal neutrality." *Id.* at 60.

²⁰⁰ See Salmon, *supra* note 198, at 210.

have consistently been quite candid in conceding that if the political union of the European communities were ultimately achieved, Ireland "would accept the obligations, even if these included defen[s]e."²⁰¹ This trend became especially pronounced as the EU intensified its plans for a common foreign and security policy—and potentially a common defense arrangement—in the early 1990s.²⁰²

The contingent, negotiable, and reactive profile of postwar Irish neutrality has been shaped by the issues of Northern Ireland sovereignty and EU membership. Ireland would have joined NATO if its territorial partition had been ended, and did join the EU in full awareness of the prospective defense and security implications. In March 1996, however, Ireland's neutrality profile was unexpectedly hardened by a government encyclical which sought for the first time to state authoritatively the place of neutrality in Irish foreign policy.²⁰³ The so-called White Paper on foreign policy conceded the obvious—that neutrality has been an honored, but not

²⁰¹ Charles J. Haughey, *Debate on Defense Policy*, Remarks by the Prime Minister, in 327 DÁIL DEB., col. 1396 (Mar. 11, 1981). Haughey quoted his predecessor, Jack Lynch, who declared in 1969 that "[b]eing members of [the EU], we would naturally be interested in the defen[s]e of the territories embraced by the [EU] . . . [t]here is no question of neutrality there." 241 DÁIL DEB., col. 1157 (July 23, 1969). Lynch's predecessor, Seán Lemass, went further than any of his successors in this regard. He spoke of "the inevitable consequence" of a military commitment within the EU, and predicted that "ultimately we would be prepared to yield even the technical label of neutrality." Salmon, *supra* note 198, at 210. During a later parliamentary debate on EU membership, Prime Minister Lynch argued that "we have no traditional policy of neutrality in this country . . . like Sweden, Switzerland and Austria," and construed the Irish Constitution (which has no specific neutrality provision) to mean that "we can make up our minds as to our neutrality . . . in the light of the circumstances prevailing." Jack Lynch, *Debate on EEC Membership*, Reply to Parliamentary Question by the Prime Minister, in 241 DÁIL DEB., col. 631 (July 16, 1969) (in an example of technical mislabeling, Prime Minister Lynch had referred to the "permanent policies of neutrality" of Switzerland and Austria; *see id.*). According to a senior Irish political analyst, "[EU] membership is the cornerstone of Irish foreign policy, not neutrality." Dennis Kennedy, *Why Fuss over Neutrality?*, IRISH TIMES, May 11, 1983, at 10, available in LEXIS.

²⁰² See Lorna Siggins, *Ireland May Sign NATO Agreement, Says Spring*, IRISH TIMES, Feb. 17, 1995, at 5, available in LEXIS, News, By Individual Publication, Irish Times File (quoting statement of former Irish Deputy Prime Minister Dick Spring in early 1995 that "neutrality could no longer define Irish foreign policy in a changing Europe").

²⁰³ GOVERNMENT OF IRELAND, DEPARTMENT OF FOREIGN AFFAIRS, CHALLENGES AND OPPORTUNITIES ABROAD: THE WHITE PAPER ON FOREIGN POLICY (1996) [hereinafter IRISH GOVERNMENT WHITE PAPER]. The White Paper was a long-delayed—and only partial—response to a call by former Labor party parliamentarian Michael D. Higgins: "I would urge [the minister for foreign affairs] to prepare a paper on neutrality. . . . I wish him well in salvaging, out of the mish-mash of confusion we have created over the years, a meaningful concept of neutrality . . ." Michael D. Higgins, *Debate on the Nomination of the Minister for Foreign Affairs*, Speech, in 330 DÁIL DEB., col. 139 (Oct. 20, 1981).

necessarily indispensable element of Irish foreign policy. It also clarified that Ireland's policy of neutrality has been characterized primarily by nonmembership of military alliances.²⁰⁴ Incongruously, however, the document also committed the government to hold a national referendum before neutrality could be dropped from the canons of Ireland's foreign policy.²⁰⁵ This commitment was not only unexpected but unnecessary. Ireland's neutrality, as shown above, has had no normative foundation in municipal or in international law. Curiously, the government's pledge of a referendum could, if translated into binding municipal law,²⁰⁶ herald an elevation to constitutional magnitude of a principle that is not contained in the Irish Constitution. The commitment, at the very least, has given neutrality a political significance in Ireland that it has not been assured recently in any of the other EU member neutrals.²⁰⁷ But it also raises the potential for conflict with Ireland's constitutional obligation to accept the treaty-based mandates of EU membership.²⁰⁸

²⁰⁴ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶¶ 2.26, 4.3. Indeed, Irish government leaders have often referred expressly to this policy of nonmembership, rather than to the concept of neutrality itself. See Lenihan, *supra* note 196. In Trevor Salmon's view, Ireland could claim to be neutral "only in the very narrow, legalistic interpretation of nonmembership of a military alliance." Salmon, *supra* note 198, at 209. The British newspaper, *The Economist*, notorious for its sardonic view of Irish public affairs, referred in a 1988 piece on Austrian neutrality to the studied vagueness of Irish concerns about security and neutrality, which it attributed primarily to Ireland's peripheral geographical placement. Such "mistiness," the writer asserted, could not suffice for Austria's security concerns. See *At the EEC's Door*, *supra* note 122, at 16. Nonetheless, official Irish opinion seems to have shared the view that neutrality and geographical isolation were closely linked. See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 2.25.

²⁰⁵ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.9.

²⁰⁶ A government White Paper, under Irish administrative or constitutional practice, does not technically bind either the promulgating administration or its successors. See E-mail from Dermot Cahill, Professor, Faculty of Law, University College Dublin, to Brian F. Havel, Professor of Law, DePaul University College of Law (Aug. 16, 1999) (on file with author).

²⁰⁷ Although Austria has a separate constitutional law on neutrality, see *supra* note 130, Article 44 of its constitution provides that "[c]onstitutional laws or constitutional provisions contained in simple laws" can be amended by the popular assemblies, without recourse to a referendum. See *Constitution of Austria*, in GISEBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 32 (Gisbert H. Flanz ed. & trans., 1998) [hereinafter CONSTITUTIONS OF THE WORLD].

²⁰⁸ For example, Article 29.4.5 of the Irish Constitution provides as follows:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State . . . necessitated by the obligations of membership of the [EU] or . . . prevents laws enacted, acts done or measures adopted by the [EU] . . . or by the institutions thereof, or by bodies competent under the [EU treaties], from having the force of law in the State.

C. *Permanent Neutrality in the Shadow of the EU's Military Complex*

Responding to the EU's military transformation, the two legally permanently neutral member states, Austria and Finland,²⁰⁹ have begun a tentative embrace of the rhetoric of the free hand—aiming, perhaps, to self-convert from a *de jure* to a *de facto* permanent neutrality.²¹⁰ Conversely, Sweden and Ireland, the two factually (*i.e.*, politically, not legally) neutralized member states, have allowed a weak revival of the idea of neutrality as mythos, but notably have not tried to sanctify the myth at a higher constitutional level than mere current government policy. All four of the EU permanent neutrals have recently practiced a kind of diplomatic retrenchment, seeking to parry the EU's deepening security integration by essentializing their neutrality as a doctrine of nonparticipation in military alliances.²¹¹ Under cover of this essentialism, the EU neutrals can participate in economic sanctions, permit troop and equipment movements within their territories, and allow warplane overflight, without necessarily observing the full panoply of secondary duties entailed by a legal status of permanent neutrality.²¹²

This study of state practice, therefore, has exposed the EU's pivotal significance in remodeling the law of permanent neutrality. My final analytical task, before reaching reconstruction of the law, is to examine the compatibility of EU membership—considered both diachronically and synchronically—with a status of permanent neutrality *as that status is substantively configured in existing*

BUNREACT NA HÉIREANN [CONSTITUTION OF IRELAND], art. 29.4.5, *reprinted in* CONSTITUTIONS OF THE WORLD, *supra* note 207, at 53. If the Irish electorate refused to renounce neutrality, the government would find itself in an interesting normative dilemma. The Constitution explicitly provides for the supremacy of EU obligations. But a binding referendum of the people would dictate a policy of neutrality—*dehors* the Constitution—that would likely conflict with some of Ireland's defense obligations under future stages of the EU common foreign and security policy. *See infra* text accompanying note 274 (discussing implications of these common policies for a status of neutrality).

²⁰⁹ Finland's classification as a legal permanent neutral, as discussed earlier, rests on conceptual assumptions that have been the subject of considerable dispute. *See supra* notes 165–66 and accompanying text.

²¹⁰ As I have shown earlier, this process of denormativization was the outcome of fortuitous geopolitical events—the Soviet collapse and the reunification of Germany—which allowed a legal rhetoric of changed circumstances to soften existing international law commitments. *See supra* text accompanying note 145.

²¹¹ *See* Paul Luif, *The Evolution of EC-EFTA Relations and Austria's Integration Policy*, in EUROPEAN NEUTRALS, *supra* note 10, at 55, 82.

²¹² Thus, only Switzerland appears to have maintained fidelity to the full conspectus of secondary duties. Austria, despite its constitutional law on neutrality, has modified its domestic laws to permit limited interventions on behalf of U.N. Security Council enforcement. *See supra* text accompanying note 151.

international law. Through this process, and a deeper study of the reactive diplomacy of the neutrals operating inside the EU's common foreign and security policy, I introduce the jurisprudential and political premises for the reformed institution of permanent neutrality presented in Part V.

IV. JURISPRUDENTIAL AND EMPIRICAL CHALLENGES IN A DYNAMIC EUROPEAN UNION

There has been frequent analysis of the conditionality of a status of permanent neutrality within the global security system of the United Nations.²¹³ But the recent regionalization of collective enforcement in Bosnia and Kosovo, and the political momentum to perfect a common EU foreign and security policy, strongly suggest that regional containment pursuant to U.N. Security Council mandate and regional solidarity in reaction to extra-regional events will occupy a more significant role in the next generation of collective action in Europe. At the beginning of the twenty-first century, the dominant regional security institution in Europe is what Stanley Hoffman has aptly styled the “baroque” coalition of administrative and political elements comprising the EU.²¹⁴ At present, and for the imaginable future, it has become the chosen public policy instrument for economic and military/defense cohesion in the post-Cold War European continent. It is time to situate permanent neutrality, as law and policy, within this dominant EU setting. I begin with brief treatments of two organizations—NATO and the United Nations—that were the primary normative counterweights to neutrality before recent efforts to reconfigure the EU as a military power.

A. *Neutralization and Static Multilateralism: NATO and the United Nations*

The common link that connects all the peacetime secondary duties of permanently neutral states is the general rule with which the *Conception officielle suisse* closes its enumeration of the secondary duties: “[T]he permanently neutral country may not *vis-à-vis* other countries enter into any obligations which in case of war would commit it to conduct contrary to neutrality, *i.e.*, conduct against the rules of ordinary neutrality law which comes into effect only in wartime.”²¹⁵

This rule assumes that permanent neutrality as an institution of public

²¹³ See *infra* note 218.

²¹⁴ See HOFFMAN, *supra* note 10, at 9 (depicting EU as “this halfway house that is far less than a federation and far more than a collection of states”).

²¹⁵ See VERDROSS, *supra* note 23, at 38.

international law commits its adherents, above all, to nonparticipation in the future wars of third states.²¹⁶ As a matter of positive law, therefore, the institution of permanent neutrality projects an emphatic military profile and its normative compatibility with various types of international organizations can be checked relatively quickly. A reciprocal defensive military alliance with automatic mutual assistance provisions—the NATO organization is now the preeminent post-Cold War example—demonstrably excludes states that proclaim enduring and comprehensive neutrality.²¹⁷ The United Nations collective security system, in effect a grand military alliance that can proceed militarily against its own members if they breach their Charter obligations, is also a threat to a fixed posture of neutrality in future conflicts to the extent that permanently neutral states may be

²¹⁶ See *supra* text accompanying note 56 (discussing norms of permanent neutrality).

²¹⁷ In the event of an offensive armed attack against a contracting party, Article 5 of the NATO Treaty obliges every other signatory party, in the framework of a system of collective self-defense, to render assistance to the victimized party. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. If the conflict escalates into a declared war, or has already done so (contingencies which are nowhere *explicitly* excluded by the terms of the U.N. Charter, see Jost Delbrück, *Collective Self-Defence*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 41, at 114, 116), the assisting parties may adopt the status of cobelligerents of their aggrieved ally. See *id.* Membership of NATO is inconceivable for a permanently neutral state, which could no longer guarantee its observance of classical neutrality in all future wars. See *supra* text accompanying note 56. It is true that neither the range nor the intensity of assistance measures is prescribed in advance, and their scope could conceivably cover the spectrum from outright armed force to mere benevolent neutrality. This responsive flexibility was confirmed in the Secretary of State's message to the President that accompanied submission of the NATO Treaty to the Senate. See 1949 U.S.C.C.A.N. 2493, 2496–97 (noting that the duty of assistance did not necessarily extend to a declaration of war). Other measures, from diplomatic protest to much stronger forms of pressure, could suffice. See SCHWEITZER, *supra* note 16, at 167–68. But even a benevolent neutrality would, according to the strict law of permanent neutrality, be impermissible, and a permanently neutral state is excluded from membership of NATO even by this most feeble measure of inter-ally assistance. Moreover, it would obviously be unsafe to attempt to predict in advance the probable intensity of a required measure of assistance. Article 5 of the founding treaty, which appears to allow discretion to the alliance parties to take such measures “as [they] deem necessary” is cast in the most pliant terms for that very reason. See North Atlantic Treaty, *supra*, 63 Stat. at 2244, 34 U.N.T.S. at 246; Torsten E. Stein, *Remarks on Structuring a New Security Regime in Europe*, 85 *PROC. AM. SOC'Y INT'L L.* 277, 298 (1991) (commenting that, under the NATO Treaty, “you can send an army corps or a telegram”). Finally, the coordination of defensive capacities that is involved in the NATO system presents a further obstacle to a future posture of classical neutrality, and thus to membership by a neutralized state. For example, it commits its members to furnishing troops, to supplying war material, and to making available supply depots and communications facilities on their territory, all of which would be in breach of specific norms of wartime neutrality, and of the derived secondary duties of permanent neutrality in peacetime. See *supra* text accompanying notes 22, 27, 58, 60.

unable to obtain exemptions from collective enforcement.²¹⁸ In a purely legal analysis, after all, the contemplated operation of the U.N. enforcement system cannot be discounted, and it is sophistic to justify permanently neutral membership of the United Nations on the ground that these states can claim (or be granted) an exemption from collective security at the very moment when the organization begins to operate in its intended capacity.²¹⁹

Throughout their existence, however, neither NATO nor the United Nations has

²¹⁸ Under the U.N. Charter, once the Security Council engages the collective security system, which may include the use of force in response to armed aggression, each member state is technically obligated to give the organization every assistance in whatever measures it adopts. *See* U.N. CHARTER art. 2, para 5; *see also* OPPENHEIM, *supra* note 6, § 292d, at 647. Under this system, therefore, a discretionary posture of nonparticipation, abstention, and strict impartiality (the juristic marks of classical neutrality) would appear to be impermissible. But the Charter allows the Security Council to adopt measures not involving armed force, such as economic sanctions, as well as measures that do involve military force. *See* U.N. CHARTER arts. 41–42. In the former case, if there is a declared war—but not otherwise—compulsory economic sanctions against the aggressor belligerent, if extended to include the private supply of military goods, would violate Articles 7 and 9 of the Hague Convention V and XIII. *See supra* note 23. As to nonmilitary goods, I have shown that there is no general duty of economic neutrality in wartime, but policy options such as the Swiss *courant normal* would be closed off to would-be neutrals. *See supra* text accompanying note 39 (discussing *courant normal*). In the case of armed force, the duty to participate is made conditional on special agreements with the United Nations to supply military units and ancillary rights such as rights of passage. *See* U.N. CHARTER art. 43, para 1. Technically, neutrality remains possible while such agreements remain pending—and indeed none has ever been concluded. *See* SWISS U.N. REPORT, *supra* note 12, at 104; *see also* HOFFMAN, *supra* note 10, at 82. The debate on whether assistance treaties *must* be concluded is unresolved. *See* HANS BLIX, SOVEREIGNTY, AGGRESSION AND NEUTRALITY 46 (1970) (dismissing compulsory participation in military action as “a remote possibility”); HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 756 (1950) (denying such a duty); Paul Frédéric, *Address, in* LEGAL ASPECTS OF NEUTRALITY, *supra* note 15, at 70, 74 (describing a “generaliz[ed]” obligation to give aid). *But see* ROTTER, *supra* note 22, at 173–74 (noting that proportionate financial liability of a neutral state for U.N. enforcement operations could constitute a grant of financial assistance for military purposes to the state being assisted by sanctions, violating the classical neutrality duties of nonparticipation and abstention).

²¹⁹ The United States, in the Gulf War in 1991, took the position that all states, irrespective of intended neutrality, were obliged to provide assistance in support of the Gulf operation in response to collective action authorized by the Security Council. *See* SUBEDI, *supra* note 78, at 155–56. Unlike its mandatory resolution on economic sanctions against Iraq, however, the U.N. Security Council’s resolution on force was not mandatory. *See* U.N. Security Council Resolutions 661 (Aug. 6, 1990) and 670 (Sept. 25, 1990) (applying economic sanctions), *available in* United Nations: Security Council Resolutions Concerning Iraqi Aggression, 29 I.L.M. 1323, 1325, 1334 (1990); Resolution 678 (Nov. 29, 1990) (authorizing force), *available in* United Nations: Security Council Resolutions Concerning Iraqi Aggression, 29 I.L.M. 1560, 1565 (1990); *see also* Subedi, *supra* note 2, at 254.

altered its founding constitutive treaty. Accordingly, the likely incompatibility between the law and policy of permanent neutrality on the one hand, and NATO or the United Nations (in the plenary reach of its powers) on the other, has been an enduring—and normatively static—fact of empirical and jurisprudential life for the European neutrals.²²⁰ Through individual but similar expressions of law and policy, the neutrals have evolved a predictable response to the quite distinct challenges that these two organizations have posed to their status. All five have remained out of NATO, which has developed beyond a parchment promise of defensive assistance into a full military organization.²²¹ And all of the European neutrals except

²²⁰ Even as NATO attempts to reinvent itself as a crisis management infrastructure, its core mission remains expressed in Article 5 of the North Atlantic Treaty, the enduring Atlanticist promise of mutual defense. See North Atlantic Treaty, *supra* note 217, 63 Stat. at 2244, 34 U.N.T.S. at 246. This automatic reciprocal assistance pledge is carefully modeled on the language of Article 51 of the U.N. Charter, which preserves the “inherent” right of individual or collective self-defense by the victims of unlawful aggression. Nevertheless, self-defense was envisaged as an interim measure to occupy the time lag until the U.N.’s collective security system could be activated. See Hirano, *supra* note 15, at 13. If the U.N. system could not work, NATO’s self-defense mechanism would prevail and endure by default. While the Charter does permit regional security arrangements, see U.N. CHARTER art. 52, it is specious to argue that NATO, in its original incarnation as a “closed, exclusive and hostile” counterweight to the Warsaw Pact, complied with the demands of a collective security system that requires the Security Council to judge *a posteriori*, rather than *a priori*, whether a country is an aggressor. See Hirano, *supra* note 15, at 13. Even more at odds with the U.N. blueprint for regional security, Article 5 of the North Atlantic Treaty completely ignores the clear precondition set in the Charter that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .” U.N. CHARTER art. 53, para 1. The Kosovo crisis in 1999 lends weight to the suspicion that this reservation of autonomy was no mere technical omission. See *Lawyer Sam’s War*, ECONOMIST, Apr. 24, 1999, at 30 (noting that NATO neither sought nor obtained a U.N. Security Council mandate to intervene in Kosovo); see also HOFFMAN, *supra* note 10, at 128 (discounting the possibility that the Security Council would ever repudiate the actions of a major power).

²²¹ NATO today has an integrated military force under a single supreme commander supported by an international staff. Its members have a common infrastructure of airfields, communications, and pipelines, without which a modern army cannot function, as well as joint management of defense production and the standardization of hardware, agreement on the reconciliation of the allies’ defense programs with their national resources, and regular and highly visible joint war exercises. Yet NATO’s founding treaty was laconic on the subject of international machinery. Article 9 mentions a council, authorized to set up such subsidiary bodies as may be necessary, and a defense committee to design measures to implement the collective self-defense system. Nothing is said about a joint international staff or combined military forces under a joint command, or indeed about the many other committees, military and civil, all of which developed later. North Atlantic Treaty, *supra* note 217, 63 Stat. at 2245, 34 U.N.T.S. at 247. See A.H. ROBERTSON, EUROPEAN INSTITUTIONS, COOPERATION, INTEGRATION, UNIFICATION 90 (2d ed. 1966); see also Jane Stromseth, *Remarks on Structuring a New Security Regime in Europe*, 85

Switzerland have accepted membership of the United Nations Organization, emboldened originally by the cold war deadlock that made it virtually impotent for most of its history.²²² The neutrals probably would not share—or would choose not to share—my characterization of the United Nations as a grand reciprocal military alliance.²²³ Nevertheless, its enforcement system, if fully deployed, is nothing less.²²⁴ In any event, the neutrals (with the exception of Switzerland) have evidently been prepared to discount the legal and political cost to neutrality of infrequent

PROC. AM. SOC'Y INT'L L. 277, 281 (1991). For a recent appraisal of NATO's post-Cold War strategic evolution and logistical endowment, published to honor the organization's 50th anniversary, see generally *Knights in Shining Armor?: A Survey of NATO*, ECONOMIST, Apr. 24, 1999.

²²² The legal impact of the political stalemate on the U.N. Security Council was that the law of classical neutrality, as Norton has shown, was invoked in a wide range of armed conflicts after 1945. See Norton, *supra* note 6, at 257; see also Lysén, *supra* note 45, at 235–36; Subedi, *supra* note 2, at 250; Detlev Vagts & Patrick M. Norton, *Neutrality: Changing Concepts and Practices*, 83 AM. J. INT'L L. 647, 648 (1989) (book review). But, in the shadow of the nonaggression ideology of the U.N. Charter, postwar manifestations of classical neutrality have been piecemeal, ambivalent, and inconsistent. See GREEN, *supra* note 6, at 80; Norton, *supra* note 6, at 276 (discussing diminished significance of terminology, in light of widespread state practice against specific declarations of war). See also *supra* note 6 (discussing status of war under the U.N. Charter).

²²³ Nevertheless, while not stipulating that the United Nations is a military alliance, in the wake of communism the Austrian government has acknowledged a more candidly interdependent view of its U.N. obligations. See Lahodynsky, *supra* note 147, at 24 (quoting former Austrian President Klestil's view that "[w]hen the members of the United Nations act against an aggressor, there can be no question of neutrality, only of solidarity"). If one shifts the ideological compass only slightly, one encounters Gustav Däniker's thesis that neutrality and solidarity are in fact *inseparable*, on the premise that a neutral state's behavior is beneficial to the political calculations and expectations of its neighbors. This forced union of two geopolitically distinct ideas, however, smacks of neutrality apologetics. See Däniker, *supra* note 26, at 6.

²²⁴ See Rudolf L. Bindschedler, *Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinigten Nationen, Besonders im Falle Rhodesiens* [*The Problem of Switzerland's Participation in United Nations Sanctions, Especially in the Case of Rhodesia*], 28 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [JOURNAL OF FOREIGN PUBLIC LAW AND INTERNATIONAL LAW] 1 (1968). In principle, no member of the United Nations would be entitled, at its mere discretion, to remain neutral in a war in which the Security Council has identified a particular state as guilty of a breach of the peace or an act of aggression, and in which the Council has called on the member concerned either to declare war on that state or to take military action indistinguishable from war. This is the cumulative effect of Article 2(5) of the U.N. Charter (in which members undertake to give the United Nations every assistance in any Charter-based action), of Article 25 (in which members undertake to accept and to comply with decisions of the Security Council), and Chapter VII of the Charter (dealing with enforcement action). See OPPENHEIM, *supra* note 6, § 292d, at 647. But see *supra* note 218 (discussing disputed—and still conjectural—question of Council waivers for neutralized states).

collective action in order to participate in a forum that is without peer in allowing them to transform official reticence into a positive asset to the world community.²²⁵ They have participated, for example, in U.N. peacekeeping operations, an extra-Charter activity invented by former Secretary General Dag Hammarskjöld.²²⁶

B. *Neutralitization and Dynamic Multilateralism: The European Union*

When four European neutrals (Austria, Finland, Ireland, and Sweden) acceded to the EU, they were aware of an institutional disjunction—absent from NATO and the United Nations—between what it had already become as a supranational organization of sovereign states, and what it might become in the future. Thus, one of the most potent political arguments directed against compatibility between permanent neutrality and the EU has been that economic integration is merely a prelude to the eventual full political union of its member states. Indeed, as Lisein-Norman has noted, a clear separation of the political and economic aspects of membership of the EEC “can scarcely be made.”²²⁷ While, as I discuss below, the configuration of a future military/defense union is already becoming apparent, I will focus initially on aspects of the EU’s existing *economic* integration, apparent textually from the earliest founding treaty, that could have been in normative conflict with the law of permanent neutrality. I will also demonstrate how the restricted escape clauses in the EU treaty structure would not have availed

²²⁵ Immediately prior to the Gulf War in 1991, the U.N. Security Council under Resolution 661, Aug. 6, 1990, and Resolution 670, Sept. 25, 1990, mandated “all [s]tates” (not only member states) to impose economic sanctions on Iraq. Paragraph 5 of Resolution 661 (1990) called upon “all [s]tates, including [s]tates non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution.” United Nations: Security Council Resolutions Concerning Iraqi Aggression, 29 I.L.M. 1325, 1334 (1990). Austria and Switzerland complied with the resolution, although each insisted that it was doing so autonomously (and, in Switzerland’s case, without any legally binding condition of U.N. membership). See SUBEDI, *supra* note 78, at 155 n.76. Austria even allowed Allied overflights. See *supra* note 151; see also Subedi, *supra* note 2, at 252.

²²⁶ Though peacekeeping (as opposed to enforcement) is unmentioned in the U.N. Charter, it has become the predominant form of U.N. military activity. It presents no legal impediment to permanent neutrality, however, because neither the Security Council nor the Secretary General has the capacity directly to deploy, command, or control troops for enforcement purposes. See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 7.29. Moreover, all but two of the over 20 U.N. peacekeeping operations established between 1992 and 1999 related to intrastate conflicts, see *id.* at ¶ 7.8, and the law of permanent neutrality technically has never been applicable to these conflicts. See *infra* text accompanying note 341. See generally Suy, *supra* note 197, at 258–65 (discussing U.N. peacekeeping operations).

²²⁷ See LISEIN-NORMAN, *supra* note 176, at 114.

neutralized states against the supremacy of their EU obligations.²²⁸ Thereafter, I will examine how the EU's evolving common foreign and security—and defense—policies have affected the potential incompatibility of the EU's economic obligations; while recent rounds of treaty-making diplomacy have hardly produced models of textual transparency, there appears to have been a marginal narrowing in incompatibility in favor of the neutral members, but at the greater eventual cost of a military superstructure that could overwhelm the legal, political, and strategic coherence of their neutralized status.

1. *A Normative Clash: Permanent Neutrality and the EU's Existing Economic System*

Two features of the European Community (EC) Treaty, the EU's principal economic treaty,²²⁹ directly threaten future compliance by neutral members with the wartime duty of impartiality, specifically with respect to the private supply of war materials. The first feature is the customs union which, according to Article 23 of

²²⁸ A brief explanatory comment is needed here on the thicket of EU treaty nomenclature. The European Union, as such, was formed by the Treaty on European Union (referred to in this Article by its popular name, "Maastricht Treaty"), Feb. 7, 1992, O.J. (C 224/1), in effect since Nov. 1, 1993. Article A of the Maastricht Treaty establishes the EU as "founded on" the European Economic Community (retitled the "European Community" by Article G(1)), the European Coal and Steel Community, and the European Atomic Energy Community, as well as a formal process of intergovernmental cooperation in the fields of foreign and security policy (Title V of the Maastricht Treaty) and justice and home affairs (Title VI). The Maastricht Treaty has been amended by the new Treaty of Amsterdam (referred to in this Article as the "Amsterdam Treaty"), Oct. 2, 1997, O.J. (C 340/1), in effect since July 1, 1999. See generally Symposium, *The European Union and the Treaty of Amsterdam*, 22 FORDHAM INT'L L.J. S1 (1999) (offering a timely analysis of recent changes in the EU treaty structure). The "European Community" (EC) is the creation of the Treaty of Rome (referred to in this Article as the "EC Treaty"), in effect since Jan. 1, 1958 (as amended by the Maastricht Treaty and most recently by the Amsterdam Treaty). The original text of the Treaty of Rome appears at 298 U.N.T.S. 11. In this Article, I use the most recent consolidated version of the Maastricht Treaty and the EC Treaty. Both of these treaties have reconfigured numbering systems that reflect revisions made by the Amsterdam Treaty, and (despite great reluctance to depart from the familiar) I use the new numbering in the main text, with footnoted cross-references to the old system. See Consolidated Version of the EC Treaty, 1997 O.J. (340/1), 37 I.L.M. 79 (1998); Consolidated Version of the Maastricht Treaty, 1997 O.J. (340/1), 37 I.L.M. 67 (1998). For an insightful panorama of the EU treaty superstructure after Amsterdam, see generally Roger J. Goebel, *The Treaty of Amsterdam in Historical Perspective*, 22 FORDHAM INT'L L.J. S7 (1999). Goebel notes how the renumbering of the treaties will create "considerable confusion for practitioners, academics, and students in the short term." *Id.* at S31.

²²⁹ See *supra* note 228 (explaining EU treaty structure).

the EC Treaty,²³⁰ is the basis of the European common market. It prohibits customs duties and charges of equivalent effect on imports and exports between member states, and adopts a common customs tariff for their relations with third countries.²³¹ Competence to alter or suspend the duties in the common customs tariff is reposed by Article 26 of the EC Treaty²³² in the Council of Ministers, the EU's principal legislative body, acting by a weighted majority called a qualified majority.²³³ In international law, considerations of neutrality apply only to the imposition of *export* duties.²³⁴ The duty of impartiality with respect to the private export of war materials²³⁵ could be seriously affected by the EU's trade policy on exports, because the competence to regulate export duties has obviously been transferred to the Brussels machinery. This competence could, in the event of a neutralized member state declaring classical neutrality, lead against the neutral's will to such an imbalanced imposition of duties as to amount in practical terms to the prevention of private export to one belligerent, and the encouragement of such exports to its adversary.²³⁶

²³⁰ TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 art. 23 (formerly art. 9) 1992 [hereinafter EC TREATY]. As previously explained, this Article uses a new consolidated numbering system for the EU treaties adopted in the Amsterdam Treaty. *See supra* note 228. When the new numbering system is cited, as in the present note, I include a parenthetical reference to the former—and more familiar—number.

²³¹ Customs duties and charges of equivalent effect were removed during the transition period to July 1, 1968. The common customs tariff was in place by decision of the EU's principal legislative body, the Council of Ministers, from June 28, 1968. *See* Council Decision 66/532/EEC, 1966 O.J. SPEC. ED. 2971.

²³² EC TREATY art. 26 (formerly art. 28).

²³³ EC TREATY art. 205(2) (formerly art. 148(2)). Each member state receives a weighted vote fraction from a total of 82 (for example, Germany has 10 votes, the Netherlands, 5). For a qualified majority, there must be 62 votes in favor. Sometimes, this rule is doubled-locked by a requirement that there must be at least 10 members in favor. *See id.* *See* TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 19–21 (4th ed. 1998).

²³⁴ The law of neutrality imposes no duty of equal treatment between belligerents when a neutral is deciding its policy of importation in wartime. Indeed, no objections were raised against the participation of neutralized states in the General Agreement on Tariffs and Trade (GATT). Because, according to Article I(1) of the GATT, each country's negotiated concessions apply equally to all signatories (the "most-favored nation" clause (MFN), *see* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. I(1), 61 Stat. A3, A12, 55 U.N.T.S. 187, 196, 198), in the event of neutrality there would be no guarantee of equal treatment for a belligerent which stayed outside the GATT system. *See* SCHWEITZER, *supra* note 16, at 220.

²³⁵ *See supra* text accompanying note 23 (discussing private trade in *matériel de guerre*).

²³⁶ These actions would probably violate Articles 7 and 9(1) of Hague Conventions V and XIII. *See supra* note 23 (discussing conventions).

A second problematic feature of the EC Treaty is Article 133,²³⁷ which ordains a common commercial policy that gives the Council of Ministers power, again acting by a weighted majority, to conclude tariff and trade agreements with nonmember states and generally to set the EU's export policy.²³⁸ In the event of a conflict where classical neutrality might be invoked, the Council could act by a weighted majority, overriding the objection of neutral members, to adopt a unilateral prohibition on exports, or to take foreign economic measures of a political character which could place restrictions on the export of arms and other *matériel de guerre*, but would exempt EU member state belligerents.²³⁹ A neutralized member would be obligated not to allow private trade with a common extra-Union enemy. Although there is no generalized economic neutrality in wartime,²⁴⁰ provisions for trade in military goods properly so-called are firmly entrenched in the law of neutrality, and the neutralized state must not abandon its duty to ensure that private trade in arms and *matériel de guerre* takes place impartially between the belligerents.²⁴¹ It would not be hard to see Article 133 being used also to approve,

²³⁷ EC TREATY art. 133 (formerly art. 113).

²³⁸ For example, Kartos mentioned the EU's common market in nuclear fuels and ore. Sweden's large nuclear industry might be obligated, within the EU, to export these dual-use materials to a belligerent member state, while being prohibited from supplying a nonmember belligerent—a violation of the duty of impartiality with respect to private manufacturers, and of the duty of abstention to the extent that the Swedish state were involved as a producer and exporter. See Kartos, *supra* note 184, at 680; see also Lysén, *supra* note 45, at 248 (noting that EU member states have lost the power to pursue independent foreign trade policies).

²³⁹ The EU regularly applies economic sanctions as a weapon of foreign policy (for example, against the Soviet Union following the invasion of Afghanistan, against Argentina during the Falklands conflict with an EU member, the United Kingdom, and against Syria for terrorist activities). Austria, in fact, amended its Constitution as of January 1, 1995, to authorize "participation in measures with which the economic relations with one or more third countries are suspended, restricted or entirely terminated." See CONSTITUTIONS OF THE WORLD, *supra* note 207, at 24 (reprinting text of Article 23f of the revised Austrian Constitution, which also authorizes Austria's participation in the EU's common foreign and security policy). The amendment appears to be facultative; presumably the Austrian government is not precluded from taking account of the special conditions that attach to trade in arms. See also Robert J. McCartney, *Neutral Austria Seeks Political, Economic Balance in Weighing Decision to Join Economic Community*, WASH. POST, July 22, 1988, at B2.

²⁴⁰ See *supra* text accompanying note 30 (discussing wartime economic neutrality).

²⁴¹ Military goods, in the context of common Article 7 of Hague Conventions V and XIII, include "arms, munitions of war, or, in general . . . anything which can be of use to an army or a fleet." ROBERTS & GUELFF, *supra* note 13, at 64; see *supra* text accompanying note 37. Council Regulation 2603/69, 1969 O.J. SPEC. ED. (L 324/25) 590, on the creation of a common scheme of exports, includes in its Annex certain goods (petroleum, crude aluminum, parts for railway vehicles, airships, certain types of watercraft, etc.) which would certainly be embraced by common

by weighted majority, public (*i.e.*, state) military assistance to a preferred belligerent, either on behalf of the EU as a whole or selected members. In either case, a neutralized state would have its wartime obligation of abstention compromised, at least indirectly, by the binding effect of the Council's decision.²⁴²

2. *No Avenue of Escape: The EU's Narrow Exceptions Provisions*

Faced with specific incompatibilities between the EU and the law of permanent neutrality, the Austrian government pursued a typical prophylactic strategy of permanently neutral states contemplating membership of international organizations, namely, the escape clauses.²⁴³ The remedy of ultimate withdrawal, a staple of arguments rationalizing neutral membership of the United Nations,²⁴⁴ was not available. The EC Treaty, by its own terms, is concluded "for an unlimited period."²⁴⁵ That means, according to Dieter Koch, that "the Treaty continues to have validity even in the case of war."²⁴⁶ Nevertheless, the EU treaty system is not yet a reciprocal defensive military alliance, where a provision allowing a signatory to suspend treaty obligations in the event of war or armed conflict would subvert the very purpose of the alliance.²⁴⁷ It remains, strictly speaking, an economic union with specific military/defense aspirations and some infrastructure supporting those aspirations already in place, and special arrangements for the event of war might seem desirable even from the perspective of nonneutralized members. A loosening of the EC Treaty would certainly be possible under the general conditions laid down in the Vienna Convention on the Law of Treaties, including by agreement of the

Article 7, and for which quantitative restrictions will apply. *See* SCHWEITZER, *supra* note 16, at 249. Because the common policy permits unilateral restrictions on exports of these products to third countries, and allows a concomitant liberalization of intra-Union trade, the Regulation is patently in breach of the impartiality rule encoded in common Article 9(1) of Hague Conventions V and XIII, and therefore of the laws of classical and permanent neutrality. The Regulations governing imports are not relevant, because the provisions of Hague Conventions V and XIII do not apply to imports. *See supra* note 234.

²⁴² *See supra* text accompanying note 22 (discussing duty of abstention).

²⁴³ It is not clear that the Austrian government was focused on the specific incompatibilities identified in the preceding section. More likely, Austria had in mind the likely incompatibilities that would be caused by deepening common defense arrangements.

²⁴⁴ On the issue of withdrawal from the United Nations, see LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 12–13, 74–76 (3rd rev. ed. 1969).

²⁴⁵ EC TREATY art. 312 (formerly art. 240).

²⁴⁶ *See* KOCH, *supra* note 26, at 129; *see also* Lysén, *supra* note 45, at 245.

²⁴⁷ *See supra* text accompanying note 217 (discussing the paradigmatic NATO alliance).

member states or using the doctrine of *clausula rebus sic stantibus*.²⁴⁸ But these contingencies of suspension would be too speculative for a legally permanently neutral state seeking to measure the prospective reach of its commitment upon accession.

Article 297, a specific safeguard provision that occurs late in the EC Treaty,²⁴⁹ served as the premise for Austria's plea of compatibility. Built into this Article is an assumption that a member state may take measures "in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."²⁵⁰ I use the guarded word "assumption" because the Article's chief goal is plainly to provide for consultation between member states to prevent competitive distortions caused by one state's emergency measures.²⁵¹ That process of consultation, however, does not restrict in any way the scope of the underlying measures, which appears to rest within the total discretion of the member state that adopts them.²⁵² The self-responsibility of member states for their security does tend to imply that they are entitled to choose the system that optimally meets their requirements for internal security—and that system could in theory include a policy, or a legal obligation, of permanent neutrality. The right to choose neutrality is therefore created implicitly rather than explicitly, but for some authors (and for Austria), Article 297 offered a reliable mechanism to assure future compatibility.²⁵³

²⁴⁸ It is outside the scope of this Article to consider the implications for traditional treaty suspension and termination of the transfer of sovereign prerogatives that is the jurisprudential signature of the EU. For an analysis of the constitutional integrity of the EU, see generally J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411 (1996).

²⁴⁹ EC TREATY art. 297 (formerly art. 224).

²⁵⁰ *Id.* Article 297 was unamended by the Maastricht and Amsterdam treaties.

²⁵¹ Thus, the Article opens by providing that "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of" the discussed emergencies. EC TREATY art. 297.

²⁵² Binswanger asserted that Article 297 and its allied safeguard provisions together provided an assurance that the pre-Maastricht EC Treaty envisaged only an *economic* organization, and therefore afforded its adherents no guarantees as to their security. See Hans Christoph Binswanger, *Ist die Aufrechterhaltung der dauernden Neutralität mit einem Vollbeitritt zur EWG zu vereinbaren? [Can The Maintenance of Permanent Neutrality Be Harmonized with Full Membership of the [EU]?]*, in *THE NEUTRALS IN EUROPEAN INTEGRATION*, *supra* note 17, at 177, 186.

²⁵³ See, e.g., Hans Christoph Binswanger & Hans Mayrzedt, *Was wird aus den Neutralen bei der Erweiterung der EWG? [What Will Happen to the Neutrals After the EEC Enlarges?]*, 25

Objections to this permissive view, however, came from two sources, one political and one textual. The political objection was from the European Commission, the EU's executive body charged with negotiating new member entry. In its opinion in 1991 on Austria's application for EU membership, the Commission rejected reliance on an Article 297 exemption as a mechanism to preserve neutrality in situations, for example, when the EU collectively sought to impose economic sanctions even in peacetime and outside the United Nations framework.²⁵⁴ The

EUROPA-ARCHIV [EUROPE ARCHIVES] 347, 352 (1970); *see also* Luif, *supra* note 211, at 81 (noting arguments that Austria's neutrality should be accepted as an obligation undertaken for the purpose of maintaining international peace and security under Article 297 of the EC Treaty). Binswanger and Mayrzedt also mentioned Article 296 of the EC Treaty, formerly Article 223. *See* Binswanger & Mayrzedt, *supra*, at 352. Article 296(1)(b), also unamended by the Maastricht and Amsterdam treaties, provides that:

[A]ny Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

EC TREATY art. 296(1)(b). The European Commission, the executive body of the EU, has attempted to give a very narrow interpretation of products intended "for specifically military purposes" so as not to restrict competition within the EU. *See* EUROPEAN COMMISSION, NINTH REPORT ON COMPETITION POLICY 72 (1980) (noting disapplication of Article 296 in patent dispute). Thus, even though this provision on its face would potentially ease some of the export incompatibilities identified in the preceding section, a neutral member might nevertheless be obliged to supply a number of commodities having the character of dual-use or strategic importance to a fellow member state at war and would be prohibited from doing the same for the other belligerent. A conflict could only arise, therefore, in relation to goods which are not incorporated in this list. But the possibility for conflict is very real, because common Article 7 of the Hague Conventions V and XIII speaks of "anything which will be of use to an army or a fleet" and thus comprises more than arms, munitions, and war material. Moreover, actions taken by member states under Article 296 (as under Article 297) are subject to review and possible reversal by the EU supranational institutions. *See infra* text accompanying note 257. For these reasons, Article 296 would not by itself be a sufficient safeguard. Ad hoc adjustments of the list, however, are excluded by the fact that Article 296(2) provides that the Council of Ministers must act unanimously to "make changes" in the list.

²⁵⁴ *See* Lahodinsky, *supra* note 147, at 27. The proposition advanced by the Austrian government, that neutrality would contribute to the maintenance of peace and international security and hence could exempt Austria from treaty obligations, was dismissed by the European Commission in its opinion of August 1, 1991, as simply unacceptable. *See European Communities Commission, The Challenge of Enlargement: Commission Opinion on Austria's Application for Membership*, BULL. EUR. COMMUNITIES, Supp. 4/92, at 17 [hereinafter *Membership Opinion*]. *See also* Lysén, *supra* note 45, at 249. The Austrian attitude to EU compatibility has had undertones

textual objection was premised on a parsing of Article 298 of the EC Treaty.²⁵⁵ This provision *requires* the Commission, if the measures taken under Article 297 distort the conditions of competition in the common market, to consult “with the State concerned” and to “examine how these measures can be adjusted to the rules laid down in this Treaty.”²⁵⁶ The putative consultations would not in themselves interrupt neutrality, but Article 298 has a second paragraph which provides that the Commission or any member state “may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in [Article 297].”²⁵⁷

The procedure explicitly short circuits the usual complex stages of consultation and reply that must be completed before the court becomes seized of a Commission or member state challenge to another member state’s actions.²⁵⁸

Thus, a legally neutralized member state may have its performance of the duties of permanent neutrality evaluated, and perhaps prevented, by its treaty-based submission to the binding jurisdiction of the European Court of Justice.²⁵⁹ There is no anterior reason why the court should accept that “obligations . . . accepted for the purpose of maintaining peace and international security,” the operative words of Article 297, should include neutralization.²⁶⁰ That phrase may just as—if not

of complacency, if not *hauteur*. Austrian commentators, for example, argued for a political veto—based on the dubious legality of the EU’s “Luxembourg Compromise” insisted upon by President de Gaulle in the late 1960s—that would enable neutral members to prevent any majority decision of the EU Council of Ministers that would jeopardize neutrality. *See* Luif, *supra* note 211, at 80–81 (discussing views of publicists). Ironically, the common foreign and security policy—in its post-Amsterdam Treaty guise—may for the foreseeable future assure Austria precisely the legal veto that it wanted, at the very moment when it feels tempted to yield its historical adhesion to neutrality.

²⁵⁵ EC TREATY art. 298 (formerly art. 225). *See* KOCH, *supra* note 26, at 128.

²⁵⁶ EC TREATY art. 298 (formerly art. 225). The phrasing is ambiguous—it might mean the state which takes the measures, or a state whose conditions of competition have been affected by them.

²⁵⁷ *Id.* (unamended by the Maastricht and Amsterdam treaties).

²⁵⁸ EC TREATY arts. 226, 227 (formerly arts. 169, 170). Thus, the Commission need not deliver a “reasoned opinion,” and a member state need not first request the Commission to do so. *See id.*

²⁵⁹ Hummer regarded the consultation provision of Article 298(1) of the EC Treaty as excluding the likelihood of a reference to the court under paragraph 2, but that theoretical possibility remains and must be considered. *See* Waldemar Hummer, *Neutralitätsrechtliche Erwägungen im Hinblick auf eine Mitwirkung an der EWG* [Neutrality Considerations Arising from Cooperation with the [EU]], in *THE NEUTRALS IN EUROPEAN INTEGRATION*, *supra* note 17, at 162, 173.

²⁶⁰ However, this was certainly the expectation of the Austrian government. *See supra* note 254.

more—plausibly refer to the active obligations of collective security within the United Nations.²⁶¹

3. *Site of Danger: Permanent Neutrality Within the EU's Evolving Security Policy*

a. *The Neutrality Enigma*

A close legal reading of the founding EC Treaty, therefore, exposes provisions with troubling implications for neutralized states, but especially for states professing legal permanent neutrality. In this respect, Switzerland and Austria, the two European states for which neutrality has been most authentically an international legal obligation, pursued strongly divergent practices after both signed economic association agreements with the EU in 1972.²⁶² Switzerland resisted any

²⁶¹ See Lysén, *supra* note 45, at 249. As Lysén noted, the language of Article 297 of the EC Treaty that concerns maintenance of international peace and security is that of the U.N. Charter. Because Article 103 of the Charter declares its superiority to all other treaty obligations, this exemption was required in order to allow the member states to comply with their obligations under the Charter. See KELSEN, *supra* note 218, at 111 (discussing implications of Article 103). Indeed, the EU's Court of Justice did give a strict interpretation of Article 297 (previously numbered Article 224) in Case 222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, ¶¶ 26, 27, 60. Manfred Rotter, a skeptic about the exemptive power of Articles 296 and 297, pointed to the ad hoc nature of these Articles, which allow specific measures to cope with specific exigencies, but do not propose any complementary emergency action by the EU institutions. The structure of the Articles, in Rotter's view, aimed less at making concessions to the need for emergency measures than at preventing the irregular functioning of the EU caused by these measures. See ROTTER, *supra* note 22, at 224. He concluded, therefore, that there would be no reason why the Court of Justice, instead of adjudicating the compatibility of the measures with permanent neutrality, would not simply dispose of the issue by deciding that no "objective" state of war existed to justify invocation of the law of neutrality. See *id.* Indeed, for political reasons, the court might choose to do precisely that.

²⁶² The history of the neutral states' repeated commercial negotiations with the EU lies outside the scope of this Article. On the association agreements signed in 1972 by Switzerland, Austria, Sweden, and Finland, see LISEIN-NORMAN, *supra* note 176, at 36, 49. See also VERDROSS, *supra* note 23, at 64; Hanspeter Neuhold, *Permanent Neutrality in Contemporary International Relations: A Comparative Perspective*, 1 IRISH STUD. INT'L AFF. 13, 21 (1982). A special dimension of Austria's relationship with the EU has been its possible conflict with Article 4 of the state treaty, see *supra* text accompanying note 128, which prohibits *direct or indirect* political or economic union between Austria and Germany. See AUSTRIAN CONSTITUTION (1983), *supra* note 60, at 98; see also KOCH, *supra* note 26, at 100. Koch argued that, other things being equal, Article 4 raised no obstacle to Austrian accession to the EC Treaty, which provides that the European Community has "legal personality." EC TREATY art. 281 (formerly art. 210). This provision would make the European Community a separate international law entity from "Germany," and Germany

further deepening of its economic and institutional relationship with the EU.²⁶³ Austria, joined by Sweden and Finland, applied for full membership in 1991.²⁶⁴ For these three states (and for Ireland in 1973),²⁶⁵ the final decision for accession to the EU hinged not on neutrality but on economic pressures, including the demands of foreign investors wishing access to EU markets.²⁶⁶ In their approach to the EU, indeed, it can be fairly charged that the member neutrals acted out of selfish motives, impairing their geostrategic reliance on neutrality and whatever residual sense of stability and security it provided in their respective regions.²⁶⁷

The EU responded pragmatically, but also prudentially, to the wave of neutral state applications in the early 1990s. In considering Austria's application, for example, the European Commission acknowledged the fact of Austria's permanent neutrality, but suggested that the problems of conflict between neutrality and the eventual and unforeseeable shape of the EU's legal and institutional infrastructure—the so-called *acquis communautaire*²⁶⁸—should not prove ultimately

in any event is a minority voting member within the voting system established under the EC Treaty. *See* KOCH, *supra* note 26, at 100. Koch was writing, however, before the Maastricht Treaty created an explicit European Union, an amorphous and complex organism which does not as yet enjoy an autonomous international legal personality. *See supra* note 228 (discussing EU treaty structure).

²⁶³ Switzerland, by referendum, rejected a second generation association status, called the European Economic Area (EEA), which the EU originally proposed in 1992. *See* HAVEL, *supra* note 27, at 275-76; *see also* Marsh, *supra* note 121. The EEA, to which Austria, Sweden, and Finland all subscribed, included broad adoption of the *acquis communautaire*, the accumulated legal and administrative heritage of the EU. *See infra* note 268.

²⁶⁴ No doubt the collapse of the Soviet Union vastly improved the prospects for treating neutrality as an ancillary rather than central question. The French government, for example, had declared as late as December 1991 that Austria could not join the EU while maintaining neutrality toward the Soviet Union. *See* Paul Taylor, *Mitterrand Backs Austrian [EU] Entry, Differences on Neutrality*, REUTER LIBR. REP., Dec. 3, 1991, at 1 (on file with author).

²⁶⁵ For consideration of Ireland's earlier accession in 1973, *see supra* text accompanying note 197-98.

²⁶⁶ *See* McCartney, *supra* note 239, at B2; *see also* Goebel, *supra* note 187, at 1100 (describing the EU's economic success as the "magnet" that lured the neutrals, not the prospect of an improved security shelter within the supra-sovereign organization).

²⁶⁷ This was a view shared (prospectively) by one commentator writing just after the 1989 revolutions. *See* Gasteyger, *supra* note 126, at 163.

²⁶⁸ The *acquis communautaire*, literally the "community's given," is a staple of EU jurisprudence—inserted into Article B of the Maastricht Treaty—that "conveys the idea that the institutional structure, scope, policies and rules of the [Union] are to be treated as 'given' ('acquis'), not to be called into question or substantially modified by new States at the time they enter." Goebel, *supra* note 187, at 1095. In accession negotiations with the neutral states, the European Commission included the Union's political objectives, notably the common foreign and

“insurmountable.”²⁶⁹ Nevertheless, the EU required Austria, Finland, and Sweden (unlike Ireland two decades before) to sign statements appended to their treaties of accession subscribing unreservedly to all the objectives of the Treaty on European Union (the Maastricht Treaty),²⁷⁰ including the future evolution of a common defense.²⁷¹ Pragmatism and prudence were both fitting. As G. Porter Elliott has described it, from the security perspective the neutrals “possessed monetary and geostrategic resources to assist the development of a common European security policy, [but also] brought with them the enigmatic third trait” of neutrality.²⁷² Wrapped in the enigma of neutrality—and implicit in the statements appended to the treaties of accession—was a troubling moral question that neither the Commission nor the neutral applicants felt prepared to confront directly in the accession negotiations: Could the prospective neutral members accept the immense economic benefits of EU membership, while simultaneously refusing to defend the Union, or any part of it, from external military attack?²⁷³

security policy, as nonnegotiable components of the *acquis communautaire*. See *id.* at 1096, 1114. The EU foreign and security policy, in fact, has been specifically described as the *acquis politique*. See Redmond, *supra* note 184, at 210.

²⁶⁹ See *Membership Opinion*, *supra* note 254, at 18.

²⁷⁰ See *supra* note 228 (discussing EU treaty framework).

²⁷¹ Treaty . . . Concerning the Accession of the . . . Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, Aug. 29, 1994, O.J. (94/C 241/07) 381 (Joint Declaration on Common Foreign and Security Policy); see also QUESTION NO. H-191/95 BY MR. GAHRTON ON NEUTRAL MEMBER STATES, EUR. PARL. DOC. (95/092) (1995) (containing question to and answer from the President-in-Office of the Council of Foreign Ministers). In 1972, during Ireland’s application process, the prospect of a common defense appeared only dimly on the EU’s future political horizon. See MEMBERSHIP OF THE EUROPEAN COMMUNITIES: IMPLICATIONS FOR IRELAND, PRL. 1110 (1970), at 6 [hereinafter IRISH GOVERNMENT EU MEMBERSHIP WHITE PAPER] (this White Paper notes the difficulty of foreseeing in precise terms the political consequences of membership, and whether a common defense would ever be included).

²⁷² G. Porter Elliott, *Neutrality, the Acquis Communautaire and the European Union’s Search for a Common Foreign and Security Policy Under Title V of the Maastricht Treaty: The Accession of Austria, Finland and Sweden*, 25 GA. J. INT’L & COMP. L. 601, 603 (1996).

²⁷³ See Joe Carroll, *Former Taoiseach [Prime Minister] Believes Neutrality Is Morally Dubious*, IRISH TIMES, Feb. 12, 1996, at 4, available in LEXIS, News, By Individual Publication, Irish Times File. The former Prime Minister in question was Dr. Garret FitzGerald, who left office in 1987. The Irish government, in fact, had recognized the eventual development of a common defense obligation as early as 1970. See IRISH GOVERNMENT EU MEMBERSHIP WHITE PAPER, *supra* note 271, at 8 (recognizing that, “as the Communities evolve towards their political objectives, those participating in the new Europe . . . must be prepared to assist, if necessary, in its defen[s]e”).

b. *Toward a New EU Security Architecture*

By the mid-1990s, however, precisely as Austria, Finland, and Sweden formally acceded to the Union, the accelerated pace of foreign and security policy coordination, and the quest for a new European security architecture,²⁷⁴ had begun to present formidable challenges to an enduring factual or legal permanent neutrality within the EU.²⁷⁵ Despite the often deserved reputation of the common foreign policy for pusillanimity and disarray,²⁷⁶ the EU significantly intensified what has

²⁷⁴ See Christopher Bellamy, *A Neutral Austria "Now in Question,"* INDEPENDENT (London), May 20, 1992, at 13. The notion of a reformulated European security "architecture" has entered the discourse of the principal institutional organs. See generally *Western European Union, Report of the Extraordinary Meeting of the WEU Council of Ministers, WEU's Role and Place in the New European Security Architecture*, WEU (Feb. 22, 1991) [hereinafter *WEU Council Report*].

²⁷⁵ The search for common EU foreign and security policies has been characterized as paradoxical. See Yves Mény, *Preface* to PARADOXES OF EUROPEAN FOREIGN POLICY ix (Jan Zielonka ed., 1998). The paradox identified in Mény's critique is central to the EU's very existence as a polity: The EU "considers the rest of the world to be foreign, while at the same time, each Member State continues to view the other members of the Union—and to some extent to relate to them—as foreign countries as well." *Id.* In other words, Mény asserts pointedly, "[t]he new is not yet born and the old is still alive." *Id.* Jan Zielonka's keynote essay reprises the idea of paradox, identifying several sources of paradox in the EU's evolving foreign policy (an enormous normative appeal as a rich, peaceful, and democratic community, but a weak operational and goal-setting capability; a modernity designed to manage economic and political interdependence that ineffectively confronts the challenges of premodern politics, the kind of military competition and national interest revealed in the Balkans; a balancing act between "straightforwardness and ambiguity," the inevitable legacy of a deliberate strategy to keep consensus behind the integration project). See Jan Zielonka, *Constraints, Opportunities and Choices in European Foreign Policy, Introduction* to PARADOXES OF EUROPEAN FOREIGN POLICY, *supra*, at 1, 11–12.

²⁷⁶ See Zielonka, *supra* note 275, at 1 (faulting the EU foreign policy for "[d]isguise, ambiguity, and a general unwillingness to make bold choices"); see also *Assembly of the Western European Union, Maastricht II: The WEU Assembly's Proposals for European Cooperation on Security and Defence, Reply to the Annual Report of the [WEU] Council, Explanatory Memorandum*, WEU Doc. 1564 (May 9, 1997), ¶ 7 [hereinafter *WEU Assembly Report*] (criticizing taking of political action outside the required institutional framework, including Bosnia contact group, negotiations with Turkey by five EU states, French proposal to hold talks with Russia over planned NATO enlargement); Timothy J. Birch & John H. Crotts, *European Defense Integration: National Interests, National Sensitivities*, in THE STATE OF THE EUROPEAN COMMUNITY, *supra* note 184, at 265, 276 (noting how the EU's attempt to broker a cease-fire in the Yugoslav crisis was marred by independent action by Germany); Elliott, *supra* note 272, at 622 n.103 (giving examples of individual member states' independent deviations from common foreign policy positions); John J. Kavanagh, Note, *Attempting to Run Before Learning to Walk: Problems of the EU's Common Foreign and Security Policy*, 20 B.C. INT'L & COMP. L. REV. 353, 354 (1997) (criticizing EU's "toothless statements on major foreign policy issues").

been aptly described as a “journey towards an unknown destination.”²⁷⁷ Building on earlier stages of foreign policy collaboration, the Maastricht Treaty (with inflections introduced in the new Treaty of Amsterdam),²⁷⁸ developed the structure for a more cohesive common foreign and security policy (CFSP) for the member states, but for the moment stopped short of legislating common defense arrangements.²⁷⁹ Defense integration nonetheless remained an object of specific, if sometimes obtuse, treatment in both the Maastricht Treaty and the Amsterdam Treaty. In EU diplomatic echelons, the metronome of progress is often the subtle textual movement from treaty to treaty. Thus, both the original Maastricht Treaty and the revised text inserted by the Amsterdam Treaty predict that the CFSP will include a common defense policy,²⁸⁰ but the Maastricht Treaty’s suppositional “eventual framing” of the policy gives way to a more agenda-conscious phrasing (“progressive framing”) in the revised version of the Amsterdam Treaty.²⁸¹

Similarly, the Maastricht Treaty’s speculation that a common defense policy “might in time lead” to a common defense has been modified by deleting the words “in time,” perceptibly narrowing the indefinite futurity contemplated in the pre-Amsterdam document.²⁸² While the hermeneutics of this style of treaty-writing can be elusive, one must always be prepared to find the marks of a courteous compromise. Thus, the phrase “common defense policy” inserted as a precursor to a “common defense,” and in the absence (typical of EU treaty-making) of accompanying textual glosses,²⁸³ suggests a diplomatic shading intended to mollify at least two opposing viewpoints about the future shape of EU security policy. A common defense surely implicates an autonomous, integrated defense organization—a common EU army and NATO-like deployment capacity—that does not yet exist but that has strong support from the Franco-German fulcrum of the EU.²⁸⁴ The more indeterminate idea of a common defense policy responds to the objections of the United Kingdom, which has insisted that NATO should be

²⁷⁷ See *At the EEC’s Door*, *supra* note 122, at 16. The journey/destination metaphor has been rejected by one EU political scientist as crassly teleological. Because it is not possible to foretell where the EU foreign policy system is headed, the idea of destination must be “mere anthropomorphism.” Christopher Hill, *Convergence, Divergence and Dialectics: National Foreign Policies and the CFSP*, in *PARADOXES OF EUROPEAN FOREIGN POLICY*, *supra* note 275, at 35, 48.

²⁷⁸ See *supra* note 228 (explaining the multiform EU treaty structure).

²⁷⁹ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 2.28.

²⁸⁰ MAASTRICHT TREATY art. 17(1) (formerly art. J.7); AMSTERDAM TREATY art. 1(10).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ See HARTLEY, *supra* note 233, at 77 (noting that the *travaux préparatoires* for the Treaty of Rome have never been published).

²⁸⁴ See *infra* note 287.

preserved as the organizing mechanism of European defense.²⁸⁵

The goal of a common defense—or even a common defense policy—might be understood as mere programmatic rhetoric, were it not for an important institutional signal in the two most recent EU treaties. In the Maastricht Treaty, the EU restyled a virtually moribund defensive reciprocal military alliance, the Western European Union (WEU),²⁸⁶ into a kind of spectral projection of a future EU defense alliance. The diplomatic triangulation of the EU, WEU, and NATO has not yet yielded coherence,²⁸⁷ not least because the WEU lacks the huge command and logistical

²⁸⁵ This position has had the curious consequence of making the United Kingdom (by default) an ally of the EU's neutral members in resisting future defense integration. *See infra* note 287. This alliance of convenience, however, was always likely to be temporary as the major EU military powers continued the process of compromise. Recently, for example, British Prime Minister Tony Blair has agreed to support a new EU defense coordination initiative that may lead to an autonomous EU defense capability separate from the NATO framework. *See infra* note 331.

²⁸⁶ The WEU was founded in 1954, but lay dormant until given fresh impetus by the development of the EU's common foreign and security policy in the 1980s. It was established by treaty in 1955. Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defense, Mar. 17, 1948, 211 U.N.T.S. 51, *amended by* Protocol Modifying and Completing the Above-Mentioned Treaty, Oct. 23, 1954, 211 U.N.T.S. 342. Article IV of the treaty establishing the WEU (211 U.N.T.S. at 59), renumbered as Article V by the Protocol of October 23, 1954 (211 U.N.T.S. at 346), is a copycat of the automatic mutual assistance guarantee in Article 5 of the NATO Treaty, *see supra* note 217. Moreover, unlike NATO, the WEU is technically not restricted in its geographical competence. *See WEU Council Report, supra* note 274, ¶ 10; *see also* Elliott, *supra* note 272, at 605, 617. All four EU neutrals have an ill-defined observer status with the WEU. *See* IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.70; *see also* M. José Cutileiro, WEU Secretary General, Speech entitled: Mutually Reinforcing Institutions and Nations: The Role of the WEU (Sept. 4, 1998) (noting that the first joint WEU/NATO exercises are scheduled for 2000) (on file with author).

²⁸⁷ *See* Hill, *supra* note 277, at 45 (noting the "imprecise" role of the EU in this triangularity). The British Labor government of Tony Blair has been unwilling to formally integrate the WEU into the EU, for fear of displacing NATO as the chief pillar of European common defense. Indeed, the United Kingdom allied itself with the four EU neutrals in blocking any proposed integration within Maastricht II, the Treaty of Amsterdam. *See WEU Integration in European Union Blocked at Summit*, DEUTSCHE PRESSE-AGENTUR, June 17, 1997, at 1; *see also* 1996 EU WHITE PAPER, *supra* note 188, at 157 (noting U.K. position of maintaining NATO and the United Nations as the foundations of European security and defense policy). In the U.K. view, in fact, territorial defense of the EU states must remain "a NATO prerogative." *Id.* On recent U.K. defense policy generally, *see* Birch & Crotts, *supra* note 276, at 266. *But see infra* note 331 (discussing the new EU defense coordination initiatives adopted in December 1999). Of course, the perspective of the neutrals is wholly different from that of the United Kingdom, which is militaristic but disagrees with its EU nonneutrals partners about the proper institutional and strategic expression of that militarism. The United Kingdom has viewed the WEU more restrictively as a bridge to NATO, while serving as a forum for coordination of a European defense capability within the Atlantic Alliance. *See id.* This is current received wisdom within the WEU itself. *See* WESTERN EUROPEAN UNION, REPORT OF

resources of NATO. Nevertheless, the Amsterdam Treaty now elevates the WEU to "integral" status in the development of the EU,²⁸⁸ and anticipates a possible final integration of the WEU into the EU.²⁸⁹ Somewhat precipitately in light of the absence of a common defense arrangement, the Treaty conscripts the WEU as the instrument "to elaborate and implement decisions and actions of the [EU] that have defense implications."²⁹⁰ These provisions reflect an inexorable militarization of the EU, and hence of the foreign policies of the neutral members.²⁹¹ With NATO's role explicitly protected in the CFSP,²⁹² the issue of congruent membership among all

THE WEU COUNCIL OF MINISTERS, EUROPEAN SECURITY: A COMMON CONCEPT ¶ 170, WEU (Nov. 14, 1995) (describing the "dual vocation" of the WEU as the defense component of the EU and the means to strengthen the European pillar of the Atlantic Alliance). The WEU has used a different metaphor, describing itself as a "hinge" connecting the EU with NATO. *See* M. José Cutileiro, *The WEU's Role in the European Security Architecture*, Remarks by the WEU Secretary General (Mar. 20, 1998) (on file with author).

The French/European Commission approach, however, would be to merge fully the EU and WEU, and indeed the former Commission President, Jacques Delors, advocated transferring Article V of the WEU Treaty, the mutual assistance provision, *see supra* note 286, directly into the EU foundational treaties. *See* Birch & Crotts, *supra* note 276, at 266. Under the Kohl government, this was also official German policy. *See WEU Assembly Report, supra* note 276, ¶ 34. The diversity of member state views about the future of an EU defense policy was apparent from member state positions notified to the European Commission in advance of the 1996 intergovernmental conference. *See generally* 1996 EU WHITE PAPER, *supra* note 188 (compiling views of EU member governments). The Treaty of Amsterdam, which entered into force in 1999, *see supra* note 228, refers to the possible integration of the WEU into the EU, and to unspecified "arrangements for enhanced cooperation" between the two bodies to be agreed upon in 2000. AMSTERDAM TREATY, Protocol on Article J.7 of the Treaty on European Union, 1997 O.J. (C 340) 102. The vagueness of the wording, which seeks to turn a commitment to further integration into an aspirational project, no doubt flowed from the Franco-German disagreement with the United Kingdom on the role of NATO.

²⁸⁸ MAASTRICHT TREATY art. 17(1) (formerly art. J.7), *amended by* AMSTERDAM TREATY art. 1(10).

²⁸⁹ *See id.*

²⁹⁰ MAASTRICHT TREATY art. 17(3) (formerly art. J.7), *amended by* AMSTERDAM TREATY art. 1(10).

²⁹¹ The word "militari[z]ation" was used by Ireland's largest left-wing political party in opposition to the Irish government's White Paper on foreign policy in 1996. *See* Sinn Féin Reaffirm Commitment to Neutrality, Sinn Féin Press Release (Mar. 27, 1996) (on file with author); *see also generally* IRISH GOVERNMENT WHITE PAPER, *supra* note 203. The WEU, at the core of the new EU defense arrangements, is explicitly based on a strategy of deterrence and defense based on conventional and nuclear weapons. *See Western European Union, Council of Ministers, Preliminary Conclusions on the Formulation of a Common European Defense Policy* ¶ 4, WEU (Nov. 10, 1994) [hereinafter *WEU Defense Policy Report*].

²⁹² *See* MAASTRICHT TREATY art. 17(1) (formerly art. J.7), *amended by* AMSTERDAM TREATY

three organizations (EU, NATO, and WEU), as the Austrian government has described it, will continue to present itself.²⁹³ It need hardly be added that no law professor could have devised such a blurry institutional configuration.²⁹⁴

c. Neutrality Within the EU Security Policy: Three Possible Responsive Strategies

Permanent neutrality—legal or factual—faces extinction within an EU that becomes a military organization founded on obligations of automatic mutual assistance and binding its members to the plenary commitments of a military bloc in wartime including base operations, troop movements, and the unilateral supply of war materials. For the EU neutralized states, three responses seem possible. The first, as I have shown in the case studies, is a preemptive repositioning of neutrality (using both rhetorical and legal discourses) as one of a number of discretionary

art. 1(10) (indicating that the evolving EU defense policy will “respect the obligations of certain Member States, which see their common defense realized in [NATO],” and “be compatible with the common security and defense policy established within that framework”). NATO’s sway over the EU security framework, in fact, has been enhanced in recent years through a NATO-affiliated organization, the Partnership for Peace (PFP), to which all of the neutrals except Switzerland have subscribed. The Partnership for Peace, launched by NATO in 1994, is an ill-contoured cooperative security initiative designed to encourage flexible engagement with NATO by nonmembers, including the four EU neutrals. Among its objectives are transparency in national defense planning and budgets, democratic control of military forces, maintenance of capability and readiness to engage in United Nations operations, and joint planning, training, and exercises to strengthen state abilities to undertake peacekeeping, search and rescue, and humanitarian missions. See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶¶ 4.44–4.53. Membership of the PFP does not entail membership of NATO itself. See *id.* ¶ 4.51. It remains to be seen how deep this mutual commitment will prove to be. Austria attempted to exclude from its ambit military exercises, restricting involvement to humanitarian missions, peacekeeping, and international disaster aid. See Didier Fauqueux, *NATO Partnership Dents Austrian Neutrality*, AGENCE FRANCE PRESSE, Feb. 9, 1995, at 1.

²⁹³ See Wolfgang Schüssel, *Austria and the New NATO* (pt. 1), Keynote address to the Participants of SHAPEX 1997 by the Vice Chancellor and Foreign Minister of Austria (Apr. 28, 1997), in Austrian Press & Information Service, (visited Apr. 23, 2000) <<http://www.austria.org/press/13.html>>; see also Charles A. Kupchan, *From European Union to Atlantic Union*, in PARADOXES OF EUROPEAN FOREIGN POLICY, *supra* note 275, at 147, 157 (proposing a formal merger of the EU, NATO, and WEU into a single politico-economic civic community called the Atlantic Union, ultimately including Russia and the other former Soviet states, but dispensing with automatic security commitments).

²⁹⁴ This is an observation that I borrow from David J. Scheffer, *Remarks on Structuring a New Security Regime in Europe*, 85 AM. SOC’Y INT’L L. PROC. 277, 288–89 (1991). Scheffer described an alphabet soup of European security organizations, only some of which have found a relevant place in the present Article.

options of foreign policy. I will not discuss that strategy further here, except to note again that it is most problematical for Austria, the only member state which has experienced a plenary legal neutralization.²⁹⁵

The second response, not inconsistent with the first given the mercurial progress of EU foreign policy, has been to draw a supposedly plausible distinction between general issues of security—including the safeguarding of common values of democracy, the rule of law, human rights, and advancement of nuclear nonproliferation and disarmament generally—and pure defense issues such as troop deployment.²⁹⁶ While the distinction has always seemed strained and overly rhetorical,²⁹⁷ all four member neutrals have already jeopardized its basic premise by agreeing to assist, albeit on a case-by-case basis, in the so-called “Petersberg” tasks—including “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking”²⁹⁸—originally set out in a 1992 WEU declaration and incorporated *expressis verbis* into the Amsterdam revisions to the Maastricht Treaty.²⁹⁹ The embrace of tasks of “crisis management, including peacemaking” is particularly troublesome, because this formula has no solid doctrinal moorings in international law and presumably could mean anything from speedy emergency relief to outright military intervention.³⁰⁰

The postwar—and indeed post-Cold War—normative degradation of war and neutrality is manifest in this litany of “tasks.” Thus, the elemental idea of war has given way to coded expressions like peacemaking—other examples include preventive diplomacy, peacekeeping, and post-conflict peace-building—while Chapter VIII of the U.N. Charter (which enables regional arrangements or agencies to deal with maintenance of international peace and security) has been repeatedly summoned in aid of military operations that do not amount to classical states of

²⁹⁵ See *supra* text accompanying note 137–38.

²⁹⁶ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶¶ 4.59, 4.64.

²⁹⁷ See Kavanagh, *supra* note 276, at 364. Former Belgian Foreign Minister Leo Tindemans, one of the lions of European unity, warned the Austrian government as early as 1988 that it would be impossible to determine “where politics and economics end and where the military side of an issue begins.” 40 CURRENT DIGEST SOVIET PRESS, Sept. 28, 1988 (No. 35), at 20.

²⁹⁸ MAASTRICHT TREATY art. 17(2) (formerly art. J.7), amended by AMSTERDAM TREATY art. 1(10).

²⁹⁹ *Id.* See Lionel Barber, *EU Neutrals to Join Defen[s]e Initiative: Austria, Finland, Ireland and Sweden Give Maastricht Review Its First Breakthrough*, FIN. TIMES, July 23, 1996, at 2.

³⁰⁰ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.73 (setting forth Petersberg tasks). The question of what “peacemaking” missions might mean, in particular, is perplexing. Is this epithet a new-age synonym for war? The Gulf War allies might certainly have described themselves as engaged in “peacemaking.” These are the first explicitly *militaristic* tasks that have been included in the EU foundational treaties.

belligerency.³⁰¹ The EU's neutral members evidently have assumed (or pretended) that functional lines of demarcation exist that separate these assorted postmodern substitutes for war from pure defense issues, but crisis situations that may result in Petersberg-type tasks can easily escalate into classical military defense operations. Indeed, it seems odd for neutralized states to embrace the open-textured Petersberg tasks and yet balk at a common defense policy that in postbloc Europe may be preoccupied almost exclusively with these very same tasks.³⁰²

A final response, thus far the most effective, plays off apparent textual concessions to the neutral members in the Maastricht and Amsterdam agreements, as well as the baseline intergovernmental rather than majority voting procedures that still govern the CFSP and its future augmentation. As to the former, the Maastricht and Amsterdam texts include language that suggests the conceivability of a neutralization opt-out from a future common defense policy (or common defense).³⁰³ Article J.4.4 of the Maastricht Treaty, for example, included a pledge that the CFSP, and any future common defense arrangements, would not prejudice "the specific character of the security and defense policy of certain Member States."³⁰⁴ The Irish government, the only neutral member at the time of the Maastricht Treaty's adoption, claimed authorial credit for this wording, and that it protected Irish neutrality (even though it mentioned neither Ireland nor neutrality).³⁰⁵ In revisions by the Treaty of Amsterdam, the formula respecting the

³⁰¹ See U.N. CHARTER arts. 52–54 (Regional Arrangements). The success of this verbal masquerade has been helped by the intrastate nature of most latter-day interventions. See *infra* text accompanying note 341; IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.19.

³⁰² This is an inconsistency that undoubtedly accentuates the irritation with neutrality that permeates the EU's nascent military establishment. See *Report of the Political Committee, Maastricht II: The WEU Assembly's Proposals for European Cooperation on Security and Defense, Reply to the Annual Report of the Council*, WEU Doc. 1564 (May 9, 1997), ¶ 75 (noting that plans to merge EU and WEU can never occur while neutral members exist; recommending that EU should admit only new members able to become full WEU members).

³⁰³ See Birch & Crotts, *supra* note 276, at 278. The EU after the Amsterdam Treaty, in fact, has been institutionally re-engineered to operate on a two-track basis, permitting some states to develop more highly integrated relationships in certain fields than ordinary membership requires. See Jean-Claude Piris & Giorgio Maganza, *The Amsterdam Treaty: Overview and Institutional Aspects*, 22 FORDHAM INT'L L.J. S32, S45 (1999). And Austria has taken note of Denmark's specific reservation of an opt-out from any future common defense arrangements (and nonparticipation in elaboration and implementation of EU decisions having defense implications). See Amsterdam Treaty, Protocol on the Position of Denmark, art. 6, 1997 O.J. (C 340) 102; see also Lahodinsky, *supra* note 147, at 28.

³⁰⁴ MAASTRICHT TREATY art. J.4.4, amended by AMSTERDAM TREATY art. 1(10).

³⁰⁵ See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.12; see also Colm Boland, *The Maastricht Debate*, IRISH TIMES, June 19, 1992, at 5, available in LEXIS, By Individual Publication, Irish Times File. The Irish government specifically interpreted this treaty language as

“specific character” of the security and defense policy of “certain Member States” was retained, in circumstances where four states were now avowedly neutral.³⁰⁶ As a savings clause it raises obvious questions about the use of an elliptical and ambiguous formula instead of a simple reference to neutrality or to its more complex legal variant, permanent neutrality, if that indeed is what the drafters intended.

The CFSP voting procedures, while not quite as congenial after the Amsterdam Treaty revisions, do offer some specific preemptive power to the neutral members, and in some circumstances could reverse the legal impact of the economic provisions considered in the previous sections. With respect to defense arrangements, as noted above, the Amsterdam Treaty provides for a common defense policy leading potentially to a common defense, but that final step will only occur should the European Council (the body formed by the heads of state and government of the EU member states) so decide.³⁰⁷ A legal veto—in other words, a requirement for consensus—is thereby implied. Moreover, any recommendation for a common defense must be adopted by the member states under their respective

protecting Ireland’s option of neutrality in future conflicts, and its nonparticipation as members of NATO or the WEU. See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶ 4.11. The Irish government’s interpretation found some support in the conclusions of the earlier Rome summit of heads of EU governments in December 1990, which included an acknowledgment of the “traditional positions” of some member states. At the time of the summit, and the ratification of the Maastricht Treaty, Ireland was the lone neutral member of the EU. See Christa van Wijnbergen, *Ireland and the Ratification of the Maastricht Treaty*, in THE RATIFICATION OF THE MAASTRICHT TREATY 181, 188 (Finn Laursen & Sophie Vanhoonacker eds., 1994). The wording was also included in a declaration on the role of the Western European Union that was adopted by the WEU/EU members at Maastricht on Dec. 10, 1991. See *WEU Council Report*, *supra* note 274, ¶¶ 10–14.

³⁰⁶ MAASTRICHT TREATY art. 17(1) (formerly art. J.7), *amended by* AMSTERDAM TREATY art. 1(10).

³⁰⁷ Ambiguity is ever-present, however. The relevant language of Article 17(1) of the Maastricht Treaty reads as follows: “The [CFSP] shall include . . . the progressive framing of a common defense policy . . . which might lead to a common defense, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.” *Id.* Read literally, this could mean either that a common defense, but not the framing of a common defense policy, requires the decision of the European Council, or that only the common defense, and not a common defense policy, requires this potentially fraught process. Moreover, it is not clear that a common defense policy (unlike a common defense) will need to be submitted to member states for constitutional approval.

constitutional requirements.³⁰⁸ Identical preconditions govern the putative integration of the WEU into the EU.³⁰⁹

Regular CFSP procedures, however, have evolved from clear intergovernmental and consensus-driven procedures in the Maastricht Treaty to a mixed intergovernmental and majoritarian process after Amsterdam. The substantive activity of the CFSP will be manifested as “common strategies,” “joint actions,” and “common positions.”³¹⁰ This classification seems to have some hierarchical force: Common strategies must be adopted unanimously by the European Council,³¹¹ while joint actions and common positions, which are intended to implement common strategies, become the stuff of ordinary Council of Ministers meetings—and will be subject, using the supranational approach of the EC Treaty, to the concept of the weighted majority.³¹² The critical issue for neutralized states lies at the intersection of the common strategy and the joint action.³¹³ The latter is a response to a specific situation “where operational action by the [EU] is deemed to be required” (for example, imposition of economic sanctions in response to an act of aggression involving third states).³¹⁴ In normal circumstances, all states have a legal veto within the European Council to prevent adoption of a common strategy. While a joint action does not apparently *require* an initiating common strategy, the revised treaty arrangements do not necessarily allow the Council of Ministers free rein to adopt majoritarian joint actions when no common strategy has emerged in the European Council. This is because a joint action without a backing common strategy will probably be subject to the general rule of unanimity for decisions of the Council of Ministers’ under the CFSP title.³¹⁵ This flows arguably from application

³⁰⁸ *See id.*

³⁰⁹ *See id.* It is unclear, however, that in either situation the European Council would be obligated to convene a further intergovernmental conference to propose amendments to the EU treaties.

³¹⁰ MAASTRICHT TREATY art. 12 (formerly art. J.2), *amended by* AMSTERDAM TREATY art. 1(10).

³¹¹ *See* MAASTRICHT TREATY art. 13 (formerly art. J.3), *amended by* AMSTERDAM TREATY art. 1(10).

³¹² *See* MAASTRICHT TREATY arts. 14–15 (formerly arts. J.4, J.5), *amended by* AMSTERDAM TREATY art. 1(10).

³¹³ The common position seems reserved for more considered responses; the revised treaty language refers to matters of “a geographical or thematic nature.” MAASTRICHT TREATY art. 15 (formerly art. J.5), *amended by* AMSTERDAM TREATY art. 1(10).

³¹⁴ MAASTRICHT TREATY art. 14(1) (formerly art. J.4), *amended by* AMSTERDAM TREATY art. 1(10).

³¹⁵ *See* MAASTRICHT TREATY art. 23 (formerly art. J.13), *amended by* AMSTERDAM TREATY art. 1(10). Abstention will not prevent adoption of the decision. There is also a modified form of

of the interpretive principle *expressio unius est exclusio alterius*, since only decisions adopted on the basis of common strategies, and decisions implementing (as opposed to adopting) joint actions or common positions, are explicitly subject to weighted vote requirements.³¹⁶ And even if this were not so, Article 23(2) of the revised Maastricht Treaty grants an extraordinary preemptive power to disaffected states to announce opposition to a proposed majority decision for important reasons of national policy, and thereby to foreclose a vote.³¹⁷ While the consequences of doing so might be formidable, a neutralized state could invoke this power to defend its neutrality obligations. The unilateral imposition of economic sanctions—which, as noted earlier, presented a threat to neutrality under ordinary EC Treaty provisions—is considered post-Maastricht as a CFSP matter.³¹⁸ While it is too early to judge the eventual impact of the revised CFSP voting processes, the best practice for neutralized states would be to ensure that the imposition of sanctions, or any other “communauterized” action that displaces neutral behavior,³¹⁹ should remain

abstention which allows the action to proceed, but requires the abstaining states to accept that the decision commits the EU and to refrain (in a spirit of “mutual solidarity”) from any conflicting or impeding action. See MAASTRICHT TREATY art. 23(1) (formerly art. J.13), *amended by* AMSTERDAM TREATY art. 1(10). If the states qualifying their abstention in this way represent more than one-third of the weighted votes, the decision fails. Since neither abstention nor constructive abstention defeats the proposed action, neutralized states can insist on their legal veto as the circumstances require.

³¹⁶ See MAASTRICHT TREATY art. 23(2) (formerly art. J.13), *amended by* AMSTERDAM TREATY art. 1(10). As one commentator has recently pointed out, the logic of this narrow group of situations is to make majority decisions more politically acceptable, since in each case they will be taken on the basis of a unanimous upstream decision (either a decision of the European Council adopting a common strategy, or a decision of the Council of Ministers adopting a joint action or common position). See Giorgio Maganza, *The Treaty of Amsterdam's Changes to the Common Foreign and Security Policy Chapter and an Overview of the Opening Enlargement Process*, 22 FORDHAM INT'L L.J. S174, S177 (1999).

³¹⁷ See MAASTRICHT TREATY art. 23(2) (formerly art. J.13), *amended by* AMSTERDAM TREATY art. 1(10). The Council may, by weighted majority, request that the matter be referred to the European Council for decision by unanimity. If this happens, exercise of the preemptive power has simply returned final decisionmaking authority to its original source (the European Council).

³¹⁸ Article 301 of the EC Treaty, formerly Article 228a, empowers the Council of Ministers to interrupt or reduce economic relations with one or more third countries on the basis of a joint action or common position adopted under the CFSP. No doubt the juristic link to the EC Treaty comes through Article 133, formerly Article 113, the common (external) commercial policy. See *supra* text accompanying note 237 (discussing scope of Article 133). The nature of economic relations affected by the sanctions power seems plenary, since there is no limitation as to goods or services.

³¹⁹ See Goebel, *Treaty of Amsterdam*, *supra* note 228, at S27 (using the word “communauterization” to describe the transition from the ordinary sovereign veto power to supranational control by EU institutions through weighted voting procedures).

subject to consensus procedures at both European Council and Council of Ministers levels.³²⁰

Despite the variety of procedures in place within the CFSP, as Christopher Hill has observed in a 1998 study, "there is no consistent and comprehensive pattern of decision making."³²¹ Hill characterized the CFSP arrangements as more precisely a complex, multi-actor culture for the creation of policy.³²² Thus, the moral challenge of solidarity—intensified after Maastricht by real institutional enhancements—returns to haunt the EU neutrals. A legalistic rationalization of their presence in this increasingly uncongenial system of shared responsibility and contrived common identity would insist that the unanimity rule grants them some notional freedom of action for the future. The argument is counterintuitive, however. Like earlier efforts to excuse U.N. collective security obligations on the ground that neutral members might win exemptions from providing assistance,³²³ it assumes a system of collective action—and ultimately, of collective assent to a common defense—that neutralized members will be compelled to sabotage at the very moment it begins to operate in its intended capacity. At present, therefore, neutrality within the EU succeeds because the common policy is a compromise-laden and unstable mixture of desired solidarity checked by a requirement of unanimity.³²⁴ But future installments of the CFSP, if it acquires a defense dimension, may not be so indulgent of the neutralized members.³²⁵

4. *Neutrality's Uncertain Future Inside the EU*

³²⁰ For a discussion of the legal issues presented by use of economic sanctions under the common foreign and security policy, see Karen E. Smith, *The Instruments of European Union Foreign Policy*, in PARADOXES OF EUROPEAN FOREIGN POLICY, *supra* note 275, at 67, 73–74. The desire for unanimity—and discouragement of veto actions—is evident from Declaration No. 27 to the Maastricht final act, on CFSP voting, in which the conference of the representatives of the member states' governments indicated that individual member states should refrain from dissent if there is a weighted majority in favor of a common action. Unanimity on the vote was thus valued separately from the issue of consent. For the text of Declaration No. 27, see Declaration on Voting in the Field of the Common Foreign and Security Policy, 31 I.L.M. 369 (1992).

³²¹ Hill, *supra* note 277, at 43.

³²² See *id.*

³²³ See *supra* text accompanying note 218.

³²⁴ See Reinhardt Rummel & Jörg Wiedemann, *Identifying Institutional Paradoxes of CFSP*, in PARADOXES OF EUROPEAN FOREIGN POLICY, *supra* note 275, at 58, 60.

³²⁵ Germany, for example, argued powerfully in its preconference position paper on the 1996 post-Maastricht intergovernmental review conference for elimination of the legal veto in decisionmaking under a new common defense policy. See 1996 EU WHITE PAPER, *supra* note 188, at 35. Germany also advocated establishment of a common market in arms and munitions. See *id.*

Wedged between the demands of law and policy, the neutralized EU members have retrenched pragmatically to the core elements of their position—nonparticipation in military alliances, nonstationing of foreign troops on their territory—to press the viability of their status.³²⁶ But if the EU emerges as a full military alliance, as intended by its most powerful economic members,³²⁷ even that essentialist pretense will fail.³²⁸ Certainly, the EU itself has no aspirations to neutrality in the global arena;³²⁹ after the Kosovo crisis in the spring of 1999, European defense planning advanced toward an eventual WEU-EU merger and a more formalized (and equalized) operational partnership with NATO.³³⁰ And, in

³²⁶ See Alois Mock (former Foreign Minister of Austria), *Austria's Role in the New Europe*, NATO REVIEW, March 1995, at 15, 17. *But see* Hill, *supra* note 277, at 47 (suggesting that neutrality has been “inevitably attenuated” as a result of participation in the common foreign and security policy and active involvement in conflict prevention).

³²⁷ In an ominous signal, the Kohl government in Germany advocated in 1996 that all EU member states should eventually become members of NATO. See 1996 EU WHITE PAPER, *supra* note 188, at 35. New member states, in fact, should accede simultaneously to the EU/NATO/WEU triad. See *id.* France, meanwhile, indicated support for a so-called “political solidarity clause” in the revised EU treaties, whereby member states which did not participate in military actions (assuming such neutrality were even tolerated) would be required to express their solidarity through public support and, where necessary, financial aid. See *id.* at 84; see also WEU ASSEMBLY REPORT, *supra* note 276, ¶¶ 14, 16 (endorsing these ideas). And, even though the Maastricht and Amsterdam treaties currently contemplate voluntary participation in military actions, the underlying philosophy of a common defense policy would hardly be served by independent action or neutrality. Thus, the WEU Council of Ministers in 1994 noted that, while each sovereign state would join specific operations by its own sovereign decision, “a common defense policy presupposes, *in the operational sense*, the readiness of participating nations to share in practice the responsibilities in the execution of operational tasks. The principle of European solidarity, or even European burden sharing, would seem to be relevant here” *WEU Defense Policy Report*, *supra* note 291, ¶ 34 (emphasis added). See also *infra* note 331 (discussing the new EU defense coordination initiatives adopted in December 1999).

³²⁸ See Lahodinsky, *supra* note 147, at 25 (noting Austrian Chancellor Franz Vranitzky’s hopeful finger-crossing when he rejected NATO membership for Austria but not participation in a system of collective security).

³²⁹ See Martin Bangemann, Remarks to the Vienna International by the Club Vice-Chairman of the European Communities (Mar. 7, 1991) (Commission of the European Communities) (noting that political union ultimately implies a common army, and that neutrality must be judged against the EU, and the new “European peace order” of the future) (on file with author). *But see* Vranitzky, *supra* note 10, at xxi (indicating that the issue of a pan-European neutrality has been raised in the United States, but arguing also that large states inevitably are factors of power in the international arena and must by definition “project” this power, thereby precluding a condition of neutrality).

³³⁰ NATO, almost by default, intervened “out of area” to become the key stabilizing factor in the Balkans. See IRISH GOVERNMENT WHITE PAPER, *supra* note 203, ¶¶ 4.37, 4.38 (discussing

December 1999, the EU took a significant step toward abolishing the cumbersome WEU-NATO duality by deciding to develop an autonomous rapid deployment force that would have military and political command structures located within the EU's Council of Ministers.³³¹

NATO's contributions to United Nations efforts in Bosnia-Herzegovina, including close air support for the U.N. Protection Force in Bosnia and its role in the military aspects of implementing the Dayton Peace Agreement for Bosnia-Herzegovina). *See also European Integration, supra* note 148. The NATO Treaty does not expressly preclude joint NATO action in out-of-area conflicts, but neither does it require it. The treaty's collective defense obligations apply only to attacks against a defined North Atlantic geographic region. *See North Atlantic Treaty, supra* note 217, 63 Stat. at 2244, 34 U.N.T.S. at 246. *See Stromseth, supra* note 221, at 283. NATO's recent emergence in Kosovo as a highly mobile fire-brigade force outside its geographical bailiwick may presage its further development as the pillar of EU common defense operations. NATO, in Stromseth's pithy paraphrase of Dean Acheson, "has lost a mission and has not yet found a role." *Id.* at 286.

It is worth noting the presence among U.S. security analysts of a strain of thinking that rejects the U.S. role in Europe using NATO as its conduit, and calls for NATO to be superseded by the indigenous capability of the EU/WEU. *See BARBARA CONRY, THE WESTERN EUROPEAN UNION AS NATO'S SUCCESSOR* (CATO Institute Policy Analysis Paper No. 239, 1995) (arguing that NATO is a Cold War alliance that lacks purpose in the absence of a defined adversary, and that the EU states have many more security interests in common with one another than they do collectively with the United States); *see also infra* note 331 (discussing the EU autonomous defense initiatives adopted in December 1999).

³³¹ In its Millennium Declaration at Helsinki in December 1999, the European Council (comprising EU heads of state and government) agreed to develop an autonomous capacity to launch and conduct EU-led military operations in response to international crises. *See Helsinki European Council, Presidency Conclusions* (last modified Dec. 10 & 11, 1999) <http://www.europa.eu.int/council/off/conclu/dec99/dec99_en.htm> [hereinafter *Presidency Conclusions*]. The so-called European Security and Defense Initiative (ESDI), which may require treaty amendments to become fully effective, foresees an EU "rapid-reaction corps" of fifty thousand to sixty thousand European troops by 2003. *Id.* ¶ 2. New political and military bodies and structures would be established within the EU Council of Ministers to ensure political guidance and strategic direction for the planned corps. *See id.* The corps would focus on implementation of the EU's Petersberg tasks of crisis intervention and peacekeeping. *See id.*; *see also supra* text accompanying note 298 (explaining Petersberg tasks). But the new ESDI, while significant as a marker of the EU's progressive militarization, has yet to address two challenges raised in this Part. First, it is unclear how the ESDI will manage or institutionalize its future relationship with NATO. At Helsinki, the European Council declared that NATO would remain "the foundation of the collective defense of its members." *See Presidency Conclusions, supra*, at Annex IV. Second, the ESDI does not alter, or propose to alter, the antimajoritarian treaty provisions that allow the neutral states to veto a formal common defense policy and to retain some operational flexibility with respect to actions proposed or initiated under the EU's common foreign and security policies. *See supra* text accompanying notes 307-320. Indeed, the Millennium Declaration restates the Amsterdam and Maastricht treaty formula that respects "the specific character of the security and defense policy of certain Member States." *Presidency Conclusions, supra*, at Annex IV. This textual compromise has been interpreted to allow a posture of permanent neutrality within the EU. *See supra* text accompanying notes 303-06. Also, the Declaration states, in an apparent concession to neutral member sensitivity, that the

Security policy must be adapted to changing needs, and the EU neutralized states undoubtedly have concluded that neutrality in its traditional practice no longer meets the challenges presented by nationalism, environmental disasters, uncontrolled migration, organized crime, and international terrorism.³³² Collective efforts in common institutions, therefore, are an expected part of interstate relationships.³³³ The EU, the world's most advanced model of economic integration, has decided that it must engage also in collective military security, and appears to have closed the question of whether this form of action is best suited to manage all forms of dislocation.³³⁴ Traditional conceptions of neutrality, in a security milieu of solidarity, cannot indefinitely survive.

V. PERMANENT NEUTRALITY IN AN AGE OF PEACE: SEVERING THE LINK WITH WARTIME NEUTRALITY

The legal status of neutrality has been in flux since the drafters of the U.N. Charter sought to suppress war as an instrument of lawful state action.³³⁵ Moreover, the recent post-Cold War resurgence of doctrines of collective security, most conspicuous for present purposes in the explicit militarization of the European Union, has created unsolved (and perhaps insoluble) obstacles to the assertion of a legal, or even factual, status of permanent neutrality in peacetime.

A. *A Definitional Fine-Tuning*

The specific issue of neutrality in a world without classical wars might require only a definitional stabiliztion. The Jessup/Schwarzenberger thesis, for example, regards all intermediate stages between a comprehensive state of war based on the parties' intentions, and the state of peace, as a mixed or middle status.³³⁶ This

envisaged rapid-reaction corps "does not imply the creation of a European army." Presidency Conclusions, *supra*, ¶ 2.

³³² See Mock, *supra* note 326, at 17; see also HOFFMAN, *supra* note 10, at 8 (discussing emergence—and overlap—of "security communities" such as the EU and NATO with aim of extensive cooperation in these fields).

³³³ See HOFFMAN, *supra* note 10, at 60.

³³⁴ See Birch & Crofts, *supra* note 276, at 265 (attributing the embrace of collective action to EU failures in the Gulf War, which exposed the continent's lack of institutional machinery and military power).

³³⁵ See Lysén, *supra* note 45, at 238.

³³⁶ See generally GEORG SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 234–55 (1962); Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98 (1954); see also GREEN, *supra* note 6, at 77 (citing numerous publicists). Schwarzenberger's thesis, set forth in an earlier article, was

obviously departs from the principle laid down by Grotius (citing Cicero)—that nothing lies between war and peace³³⁷—which was the maxim from which the classical law of neutrality derived its meaning. Such an intermediate category, however, could bridge the conceptual gap between traditional and modern practice, since it would sweep into the basic war/peace paradigm of permanent neutrality all those intermediate hostile measures short of full-scale war—such as economic blockade, humanitarian intervention, punitive action, and even propagandization³³⁸—which do not involve or necessitate the policy of employing the maximum application of force, by which the state of war was historically defined.³³⁹ Effectively, modern treaty practice seems to assume that the term “armed conflict” (or “international armed conflict”) should replace the classical notion of war.³⁴⁰ In a further recognition of the shift in discourse, a restabilized

particularly compelling:

Whether the state of peace continues with the [s]tate against which limited force is applied or not, depends on the latter's decision. Similarly, it is left to third states to *decide for themselves whether, in their relations with the contending [s]tates, they prefer the laws of peace or neutrality*. Even if all [s]tates directly and indirectly concerned acquiesced in the limited use of force, it appears to be a misnomer to call such a *pax bellicosa* by the name of peace. It is equally unwarranted to call war a state in which both contending [s]tates insist on the continuation of their peaceful relations, merely because third [s]tates wish to apply the law of neutrality during such a *bellum pacificum*. These constellations are incompatible with the states of peace and war; they constitute a state of their own, a *status mixtus*.

Georg Schwarzenberger, *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460, 470 (1943) (emphasis added).

³³⁷ Or, as originally (and more elegantly) expressed, “inter bellum et pacem nihil est medium.” DE JURE BELLICAC PACIS, Bk. III, Ch. XXI, s. 1 (1625). See Hari Haya Aiyar, *Address*, in LEGAL ASPECTS OF NEUTRALITY, *supra* note 15, at 40, 45. An inflexible war/peace polarity has substantial, if somewhat outdated, precedential and academic support. See GREEN, *supra* note 6, at 76–77 (citing legal decisions and publicists).

³³⁸ See Vranitzky, *supra* note 10, at xx (noting that classical international law has little to say on these modern forms of interstate confrontation, which in his view must be tackled as questions of neutrality policy).

³³⁹ See Neuhold, *supra* note 20, at 187; see also GREEN, *supra* note 6, at 128 (concluding, based on survey of doctrine and of military operations amounting to armed conflict, war, compulsory measures short of war, and measures of self-defense, that “traditional definitions of war to apply to all situations and in all circumstances have outlived their usefulness”); Guttman, *supra* note 3, at 58 (appearing to reject neutrality with respect to internal human rights violations).

³⁴⁰ Thus, the Geneva Convention on treatment of prisoners of war specifically takes into account the existence of “non-war” armed conflicts and stipulates that only one belligerent need declare war for the Convention to take effect. Geneva Convention III Relative to Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136. Similarly,

definition of neutrality would allow for the prevalence of postbloc *intrastate* armed conflict by recognizing a formal status of neutrality with respect to all internal disputants.³⁴¹

B. *Toward A Substantive Change: The Lessons of Neutrality Policy*

In an era of solidarity and interdependence, however, definitional enhancements of old concepts rooted in the law of war may have limited appeal. Collective security systems, as this Article makes clear, pose the most formidable post-Cold War challenge to permanent neutrality. In Part IV of this Article, I demonstrated that membership of the United Nations, of NATO, and potentially of the EU, cannot be reconciled with a regime of neutralization that requires its adherents to guarantee their future nonparticipation in all third party conflicts, to remain outside all military alliances, and not to permit their territory to become the base for future military operations. No measure of interpretive alchemy will force a neutralized status, with its fundamental norm of future nonparticipation, into concordance with a reciprocal defensive (or offensive) military alliance. What this Article offers instead is a reconceptualized, more politically assertive idea of peacetime permanent

Geneva Protocol I of 1977 substitutes the phrase "international armed conflict" for war. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 1(4) 1125 U.N.T.S. 3, 4.

³⁴¹ To this extent, a redefined neutrality would be in step with what appears to be a broader paradigmatic shift in the international law of armed conflict. See GREEN, *supra* note 6, at 128–29 (calling for adaptation of the law to "realities of the situation," *inter alia* in order to give effect to humanitarian laws); see also Prosecutor v. Duško Tadić, 36 I.L.M. 908, ¶¶ 60–74 (Int'l Crim. Trib. for the Former Yugoslavia 1997) (holding that the term "laws and customs of war" should include prohibition of acts committed both in international and internal armed conflicts (citing Article 3 of the Geneva Protocol II of 1977)); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (holding that common Article 1 of the Geneva Conventions applies to noninternational armed conflicts); see ROBERTS & GUELFF, *supra* note 13, at 171, 194, 216, 272, 449–50. But see GREEN, *supra* note 6, at 219–20, 407, 409 (questioning internal application of Article 1 as a juridical matter, since "black-letter law" provides that war crimes can be committed only during an international armed conflict, but accepting the special importance of applying international humanitarian law even to noninternational conflicts). Costa Rica, which declared itself permanently neutral in 1983, stated that its policy would extend to armed conflicts *within* states. See SUBEDI, *supra* note 78, at 147. The creation of an International Criminal Court will be an important step in eliminating the distinction between treatment of international and noninternational conflicts. See generally M. Cherif Bassiouni, *Historical Survey: 1919–1998*, in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1 (M. Cherif Bassiouni ed., 1998) (explaining and assessing the evolution of the new tribunal).

neutrality. This new neutrality will be divorced from its historic underpinnings in the law of war. It will accord greater flexibility to states that choose neutralization to cooperate with collective security operations while remaining outside formal alliances. The EU member neutrals, if they wish to preserve their neutralized status, will then face a unique political challenge: Preserving this reformed, "activist" neutrality within a collectivist system that they would join only on a selective, case-by-case basis.

The basis for reform, I believe, lies in a dimension of permanent neutrality that I have until now mentioned only in passing. The European neutrals, in particular, have long practiced a kind of prophylactic neutrality policy in order to emancipate themselves from the passivity—and frankly, occasional unwelcomeness—of their fundamental posture of neutralization.³⁴² The law of permanent neutrality has never contained any requirement that a neutralized state should shape its foreign policy in peacetime so that third states are not in doubt as to its commitment to observe neutrality in all future international wars.³⁴³ While states may sometimes practice forms of economic or even ideological neutrality in order to give assurance to the universe of would-be belligerents,³⁴⁴ there is no coordinate duty in the law of classical neutrality that would project an antecedent peacetime secondary duty to conduct an equivalent neutrality policy.³⁴⁵

A neutralized state has full discretion not only in choosing whether to pursue a peacetime policy of neutrality, but also in devising the mix of its constituent elements. The Swiss jurist Max Huber, writing in 1937, observed that neutrality policy comprised "the flexible part, as it were, of neutrality."³⁴⁶ To a great extent,

³⁴² This policy should be initially distinguished from the factual neutralization—also a matter of policy—that describes the discretionary foreign policy choices of Sweden, Ireland, and, despite a thin legal neutralization, probably also Finland. *See supra* text accompanying note 153, 171.

³⁴³ Although that commitment is, as I have shown in Part II, the premise of a juridical status of neutralization. *See supra* text accompanying note 56.

³⁴⁴ Neither economic nor ideological neutrality has ever been required by the law of classical neutrality—and therefore, by the analogical process of norm-derivation used in Part II, could not form part of the law of permanent neutrality. *See supra* text accompanying notes 30, 64–65.

³⁴⁵ For the derivational techniques used to formulate the peacetime norms of permanent neutrality, see *supra* text accompanying note 56.

³⁴⁶ VERDROSS, *supra* note 23, at 15. I have noted this apparent flexibility in relation to such concepts as the level of defense preparedness a neutralized state should seek to maintain, as well as the so-called entrance price strategy. *See supra* text accompanying note 62. It is hardly surprising that a neutralized state would practice a foreign policy that seeks to build confidence in its chosen status and to present to the world community the image of a dynamic and socially beneficial security policy that might retain a place in modern geopolitics. The Swiss Political Department, now the Department of Foreign Affairs, declared as early as 1956 that Switzerland

no doubt, the spurning of military alliances, and compliance with the other secondary duties of permanent neutrality in peacetime, represent in themselves the fulfillment of a peacetime policy of neutrality by neutralized states. Schweitzer, in fact, has described fidelity to the peacetime secondary duties (the *Vorwirkungen*³⁴⁷) as the practice of "neutrality policy in the widest sense."³⁴⁸ Nevertheless, my concern here is with a pattern of official state conduct that goes beyond the discharge of obligations which are mandated in any event by international law (or, in the case of factually neutralized states, which provide the template for certain specific characteristics of a discretionary foreign policy).

What, then, is included in this accretion of foreign policy initiatives? In Ireland (a factually neutralized state), the ascription of moral power to neutrality, its missiological potential as an instrument of promoting peace, has sometimes been described as "principled" or "positive" neutrality.³⁴⁹ And this self-conscious use of neutrality as a talisman of peace has a proven historical record. In the Cold War era, the European permanently neutral states were in the vanguard of the quest for disarmament and arms control and the relaxation of East-West tensions.³⁵⁰ Hans Mayrzedt called attention to one of the signal successes of activist neutrality, the perceived special merit of neutral states to act as mediators.³⁵¹ This service was

"in many ways exceeds the demands of duty . . . for political reasons so as to reinforce confidence in the maintenance of its neutrality." VERDROSS, *supra* note 23, at 15-16 (quoting the *Conception officielle suisse*).

³⁴⁷ See *supra* text accompanying note 55 (discussing this doctrine of "pre-effects").

³⁴⁸ SCHWEITZER, *supra* note 16, at 144.

³⁴⁹ For Ireland, the focus of this species of neutrality has been participation in United Nations peacekeeping activities. See Patrick Smyth, *European Diary*, IRISH TIMES, Mar. 3, 1995, at 8, available in LEXIS, News, By Individual Publication, Irish Times Files; see also *supra* note 197.

³⁵⁰ See Neuhold, *supra* note 20, at 183. The flavor of an activist foreign policy for the European neutrals was suggested by the former Chancellor of Austria, Dr. Bruno Kreisky:

[W]e had to be concerned not to allow neutrality to be the occasion for an isolationist policy Rather, we gave to our foreign policy (which of course was always to be understood as a neutrality policy) a global aspect, and thus a thoroughly active character. We participated in the work of the Council of Europe and in the United Nations, and we regarded this co-operation as the precise correlative of our neutrality policy.

GINTHER, *supra* note 125, at 127. Thus, neutrals could sometimes undertake diplomatic initiatives that members of military blocs might have found difficult to launch. Lehne mentioned Austrian relations with the German Democratic Republic in the 1970s and its resumption of diplomacy with Poland after the imposition of martial law in 1981. See Stefan Lehne, *Austria's Changing Role in a Changing Europe*, in EUROPEAN NEUTRALS, *supra* note 10, at 201, 203.

³⁵¹ See Hans Mayrzedt, *Veränderungen der politischen Bedingungen der Neutralität* [*Changes in the Political Conditions of Neutrality*], in THE NEUTRALS IN EUROPEAN INTEGRATION,

rendered most effectively by the participation of four of the five European neutrals in the Hammarskjöld-inspired U.N. peacekeeping missions since 1956.³⁵² The sum of this activity has demonstrated what Mayrzedt referred to as the contrast between the dynamism of the real world and the relative stasis of international law.³⁵³ Moreover, as Dieter Koch insightfully suggested, it is precisely from the correspondence and crystallization of the peacetime policies of neutrality of the neutralized states that what might be called the second generation of norms of the law of permanent neutrality will be evolved.³⁵⁴

C. *A New Permanent Neutrality*

I propose, therefore, a new conceptual articulation of permanent neutrality that emphasizes—indeed gives primacy to—its service to the law of peace.³⁵⁵ As a technical matter, this new regime of permanent neutrality will exploit the modern normative degradation of the law of war by severing the juristic link between neutralization and wartime neutrality. Neutralization in this reworked design will be chosen explicitly as an institution of the law of peace, neither legally nor

supra note 17, at 32, 37.

³⁵² On peacekeeping missions generally, see Suy, *supra* note 197, at 258–65. Indeed, all of the neutrals have used the auspices of the United Nations as a useful vehicle for neutrality policy. Thus, every twelfth U.N. soldier has been an Austrian. See Lahodinsky, *supra* note 147, at 26.

³⁵³ See Mayrzedt, *supra* note 351, at 37. These initiatives did not entirely quiet critics of permanent neutrality, of course. One recidivist critic of Swiss neutrality has written that the offering of conference facilities for intersystemic disarmament talks can be regarded as “a geographical role rather than a political one.” JEAN ZIEGLER, SWITZERLAND EXPOSED 130 (1978); see also ZIEGLER, *supra* note 3, at 169 (revisiting this caustic sentiment 20 years later). And it remains to be seen whether future arms control treaties will entrust neutralized states with tasks of verification. See Hanspeter Neuhold, *Austrian Neutrality on the East-West Axis*, in NEUTRALITY AND NON-ALIGNMENT, *supra* note 118, at 62, 68. But the neutrals continue to offer this service, and there is a sympathetic politico-cultural response to the idea. Austria and Finland, for example, extended an open invitation to host the 1998 Northern Ireland peace talks. See *Austria, Finland Likely to Host Ulster Peace Talks*, Xintnua News Agency, Jan. 5, 1998, available in LEXIS, News, Wire Service Stories.

³⁵⁴ See KOCH, *supra* note 26, at 133.

³⁵⁵ There has been a growing sense among scholars that permanent neutrality, even in its existing form, had become part of the law of peace. Konrad Ginther, in a 1975 retrospective on Austrian neutrality policy, traced an evolution in the official interpretation of Austrian permanent neutrality from its original military-oriented imitation of the Swiss prototype to its emergence from the mid-1970s as a positive instrument of foreign policy inspired by the Soviet doctrine of peaceful coexistence. See GINTHER, *supra* note 125, at 57. Ginther concluded that “[p]ermanent neutrality can nevertheless be understood, even though it stands in a direct functional relationship with the contingency of war, as an institution in the service of peace.” *Id.* at 150 (emphasis added).

analogically subordinate to the antecedent effects of a contingent future status of classical neutrality. In contrast, the tension-reducing initiatives of the existing neutralized states have served chiefly as a policy adjunct to the primary goal of their international law status (or chosen political status), to remain outside all future wars.³⁵⁶ In the reformed regime, a state which chooses a neutralized status will do so in pursuit of the broad mission of *pacigérance*, the geostrategic management of peaceful initiatives.³⁵⁷ Unbound from the law of war, neutralization as an instrument of peace will offer a flexibility to join collective security actions that—quite apart from the basic incompatibility of permanently neutral membership of these organizations—previously carried a perpetual risk of violating the wartime norms of nonparticipation, abstention, impartiality, and prevention.

According to this blueprint, the new institution would be formally adopted by states using one of the modes of neutralization discussed in Part II,³⁵⁸ and would derive its substantive content from the overarching obligation to maintain and pursue peace. This obligation would supersede the existing core duty not to enter into any arrangements which in case of war would commit a neutralized state to conduct contrary to classical neutrality.³⁵⁹ Because a commitment to peace (or even

³⁵⁶ This reconceptualization of neutrality, focusing on measures of *détente*, has continued to be of interest to the post-Communist Russian leadership, which has stressed the positive potential of neutral states through peacekeeping operations and contributions to stability. See *Official Kremlin International News Broadcast: Press Conference with Yevgeny Primakov, Foreign Minister of Russia, and Wolfgang Schüssel, Foreign Minister of Austria* (Federal Information Systems Corporation, Nov. 4, 1996).

³⁵⁷ Former Austrian President Dr. Rudolf Kirchschlager suggested the label *pacigérance*, a neologism meaning “management of peace,” to summarize the irenic initiatives with which permanently neutral states have become identified. See GINTHER, *supra* note 125, at 127. Kirchschlager also proposed the terms *Friedenspolitik* [peace policy], *Friedensführung auf der staatspolitischen Grundlage der immerwährenden Neutralität* [the pursuit of peace on the political basis of permanent neutrality]. See *id.*

³⁵⁸ The choice of mode would be determined, presumably, by each neutral’s geopolitical circumstances. To maximize the number of nations respecting the status, and to enhance the appeal of the status, the tri-form method of unilateral promise, notification, and recognition has obvious advantages over the more confined process of treaty-making. The choice will also depend on whether a newly-neutralized state wished to receive a guarantee of its chosen status—including, if need be, military support in the event of a violation—from a specific circle of participating states. See *supra* note 80. Because the reformed institution explicitly breaks with the law of war, however, candidates for neutralization might prefer to avoid the “alliance-building” connotations of neutralization by treaty, or by promise and recognition. An alternative, therefore, would be to issue a simple unilateral declaration and to rely on the consequences attributed by the *Nuclear Tests* jurisprudence. See *supra* note 90 and accompanying text.

³⁵⁹ See *supra* text accompanying note 215 (discussing Swiss exposition of this core obligation).

to *paciférance*) would not impose on neutralized states a necessarily more onerous obligation than that shared by all members of the United Nations to refrain from the threat or use of force,³⁶⁰ the existing anterior duties of permanent neutrality—including nonparticipation in military alliances, avoidance of treaties that would obligate them to channel war materials or troop contingents, a ban on present or future military bases on neutralized soil, and a ban on troop transit or the use of neutral airspace for military purposes—will continue to bind neutralized states,³⁶¹ independently of the law of wartime neutrality, as the specific marks of their new status. The proposal I make here is, very deliberately, an inversion of the historical practice of the neutralized states, which used neutrality policy solely as a mechanism to obtain respect for their existing commitment to the secondary duties.

A reformed permanent neutrality, as an institution of the law of peace, would be an appropriate geostrategic response to the unsettled and atomized circumstances of the post-Cold War order. The hard certainties of interpower confrontation, which made the institution of permanent neutrality so reliable and predictable, have vanished. Moreover, a brutally realistic assessment of international affairs might suggest, contrary to liberal utopian hopes for a world society and universal peace, that force as an instrument of state policy has not been abandoned. It has merely been reconditioned as a matter of law—though not very satisfactorily—and is liable to erupt sporadically and incoherently in widely-separated ethnic conflicts, civil wars, and failures of postcolonial independent states.³⁶² A flexible neutralization, in these circumstances, serves coordinate purposes. It builds on the most successful peace-enhancing aspects of neutrality policy, while allowing neutralized states to decide, on a case-by-case basis, whether and to what extent particular situations require intervention in support of peace. The forms of intervention, incidentally, will only rarely require resort to military engagement or assistance to a military engagement. Neutrality policy has shown the success of broadly-sculpted initiatives such as support for policies of nonproliferation in a world where lesser powers have access to nuclear know-how, humanitarian aid to refugees, and reinforcement of the authority of international institutions (including regional arms limitation and peaceful dispute settlement and mediation).

Within this framework, moreover, there is still a place for the simple declaration of nonparticipation, rather than of classical neutrality, as a choice for

³⁶⁰ See U.N. CHARTER art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

³⁶¹ See *supra* text accompanying note 56 (deriving obligations of peacetime permanent neutrality).

³⁶² See HOFFMAN, *supra* note 10, at 23 (discussing the skepticism of political scientist Hedley Bull concerning emergence of a genuinely “transnational” society).

peace. The neutralized states, which typically do not exercise either global or regional hegemonic power, would not be expected to engage themselves in all collectivized actions purportedly pursued in the name of human rights.³⁶³ This is a political reality in a system where the rules of armed intervention and non-intervention are not at all clear, and (as the Kosovo experience has taught) the United Nations system is not even technically adept to determine what these rules might be.³⁶⁴ The rules of engagement for the "hegemonic enforcers," as Hoffman has described powerful regional security organizations such as NATO, remain highly indistinct and contingent.³⁶⁵ In the absence of agreed international principles of intrastate enforcement,³⁶⁶ for example, a neutralized state might justify its absence from intrastate conflict—and even nonparticipation in humanitarian efforts—on the principle that it wishes to use its nonparticipation in pursuit of alternative resolutions, including diplomatic initiatives or regional pacific

³⁶³ It may be, moreover, that this reformed permanent neutrality will be a better conceptual fit with an emerging individual-centered approach to human rights reflected in global conventions on genocide, human rights, and racial discrimination, as well as the Geneva Conventions and their protocols. *See generally* Prosecutor v. Duško Tadić, 35 I.L.M. 32 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (discussing normative shift of international legal system toward human rights). The recognition of fundamental human rights as norms of *jus cogens*, indeed, will allow permanently neutral states, within this new flexibility, to join enforcement measures—whether or not armed force is involved—against states which engage in human rights violations, without having to justify exceptions from possible wartime obligations of neutrality. On this final point, see *The Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 262 (July 8) (noting that the principles and rules of law applicable in armed conflict have, at their heart, "the overriding consideration of humanity"); *see also* HOFFMAN, *supra* note 10, at 68 (writing of a superordinate human right to peace as the proper fundamental norm of modern international relations).

³⁶⁴ "[T]he international 'community' has recognized Croatia, Bosnia, and Eritrea, but not Biafra, Chechnya, or the right of the Kurds and Tibetans to states of their own." HOFFMAN, *supra* note 10, at 79. Hoffman noted that the United Nations was created to manage a constellation of interpower conflicts, so that many of its post-1991 interventionist exercises have simply exceeded its capacity. *See id.* at 81. The United Nations, in fact, lacks any permanent force for preventive action or peace-building in intrastate crises. *See id.* at 82.

³⁶⁵ *See* HOFFMAN, *supra* note 10, at 81 (noting lack of coherence in U.S. policy, which comprises a laundry list of worthy goals but no predictable strategy for intervention).

³⁶⁶ Hoffman presents four kinds of measures that could set the terms for collective intervention in a domestic setting for humanitarian purposes (*viz.*, a treaty that defines the circumstances for collective intervention; a Security Council resolution under Chapter VII defining a civil war as a threat to international peace and security and authorizing a peacekeeping mission or even a peace-enforcing one; a system of treaties protecting minorities through cultural and administrative autonomy, with refusal to accept a treaty being penalized at least by exclusion from credits and economic benefits of international organizations and banks; and a reinforced system for monitoring human rights violations, again enforced by exclusion from economic and military aid). *See id.* at 136–37.

settlement. Again, an opportunity for the rules of permanent neutrality—albeit reconditioned by postbloc events—has been created in the context of an international vacuum in power relations. This is precisely how international law rules *should* function, as regulators of state action in shifting geopolitical situations.³⁶⁷

D. *A Remodeled Neutrality Within the EU*

Within the EU, the challenge of *pacigérance* is particularly acute, given the momentum of change discussed in Part IV. Under a reconceptualized permanent neutrality, neutralized members, in virtue of their status, would have a *duty*—no longer merely a discretionary option of foreign policy—to influence their fellow members toward a conception of the EU as a peace project, even as it acquires the trappings of militarization.³⁶⁸ Preventing the evolution of the EU into a military superpower with ambitions to project its power “out of area” may be an objective of *pacigérance* in itself.³⁶⁹ At present, the neutral members might be able, given the

³⁶⁷ See *supra* text accompanying note 10.

³⁶⁸ At one time, such a suggestion was considered merely a matter of Soviet propaganda, weakening the EU’s emergence as a military power from within through the presence of neutrals. See Bo Petersson, *Is There Today a Specific Soviet Outlook on Neutrality?*, in EUROPEAN NEUTRALS, *supra* note 10, at 185, 189.

It is possible to conceive of the permanent neutrals in the EU allied together as a collective neutrality, adopting a specialized form of interstate alliance that modern international law, based on principles developed by Indian diplomacy in the 1970s, treats as a “zone of peace” (ZOP). See SUBEDI, *supra* note 78, at xli–xlii (explaining ZOPs as latter-day multistate derivatives of neutralization and demilitarization). The conditions of a zone of peace resemble the hard core obligations of permanent neutrality—nonparticipation in military alliances and a complete prohibition on the establishment of foreign military bases. See *id.* at 157–58. The difference between adoption of permanent neutrality and ZOP status is the difference between acting as an independent sovereign state (in choosing permanent neutrality) and acting in a concert of powers (by forming a ZOP). See *id.* at 157–61. But it is not at all clear, however, that a ZOP is properly a form of neutrality. If one of the states in a ZOP is attacked, the others are typically expected to intervene on its behalf, a strategy scarcely consonant with permanent neutrality (and indistinguishable, in fact, from the duties of the partners to a reciprocal defensive military alliance). International law, in fact, has yet to evolve a mechanism for a collective neutrality in which the participating states remain impartial even when a member of the group is attacked; perhaps the very idea is a logical impossibility. It is at least a *legal* impossibility as long as neutrality is defined in terms of adoption by individual sovereign states rather than groups of states. But there is no reason why a model of collective neutrality, with mutual defense obligations engaged for protection of the neutrality of the collective, could not develop in the future. See *id.*, at 157–60, for an enlightening discussion of some of these issues.

³⁶⁹ But, as one leading European political scientist has recently asked, would turning the EU into a civilian power or new type of “condominium” deprive it of the ability to cope in an

requirement of consensus, to dissuade their EU partners from pursuing the seemingly inexorable logic of matching military and political weight to economic strength.³⁷⁰ That objective will become even more urgent, and concomitantly more difficult, as the right of legal veto is cut down in future stages of the common defense policy.

It is supremely ironic that the EU, founded on the almost quixotic objective of Franco-German *entente*, is now potentially transforming itself, after the Cold War, into a military hegemon in its own right.³⁷¹ A civilian EU, as Karen Smith has recently proposed, would respond to the idea that security in the post-Cold War era has a much broader meaning than military security, giving the EU a long-term comparative advantage, having renounced the use of force among its members, to use what Smith calls civilian instruments—propaganda, multiple species of diplomacy, economic assistance and cooperation—to control and inoculate against potential crisis environments.³⁷² It would not be inconsistent with these alternatives to militarization, however, for the EU to maintain a crisis management structure modeled on its Petersberg principles,³⁷³ but for neutralized members participation in these interventions—particularly in light of the normative uncertainty of rights

“uncivilized” world? See Zielonka, *supra* note 275, at 2.

³⁷⁰ The political difficulties of doing so cannot be underestimated. The WEU’s parliamentary assembly, for example, has shown intense hostility to the neutrality of four EU members, accusing them of halting the EU’s emergence as a military power. See *WEU Assembly Report*, *supra* note 274, ¶¶ 111–13. Moreover, the WEU Secretary General has rejected ad hoc “coalitions of the willing” as the proper future direction of EU defense arrangements on the ground that they will lead to renationalization of defense policies and the promotion of regional ad hoc arrangements over permanent European interests. In the Secretary General’s view, such coalitions evoke a nineteenth century Westphalian vision of Europe rather than the “single market, single currency, common foreign and security policy Europe of the twenty-first century.” See Cutileiro, *supra* note 286.

³⁷¹ This was precisely the argument raised in a 1998 report on Irish neutrality by the conference of the Methodist Church of Ireland. See Patsy McGarry, *Church Backs Peacekeeping Role for Army*, *IRISH TIMES*, June 10, 1998, at 3, available in LEXIS, News, By Individual Publication, Irish Times File (noting report’s comment that the original institutions which evolved into the EU “were founded on the moral principle of banishing war and oppression from Europe”). The geostrategic justifications for a common EU defense policy included the risks posed by the Balkans crisis, the weakness of the EU’s contribution to the Gulf War mobilization, and even the emergence of a common European currency. See *WEU Council Report*, *supra* note 274, ¶ 8. But it remains unclear why the EU itself should be the centrifugal military as well as economic power, given the longstanding separate existence of the NATO command structure. This appears to be the current British opinion. See *supra* note 287.

³⁷² See Smith, *supra* note 320, at 79.

³⁷³ See *supra* text accompanying note 298; see also *supra* note 331 (discussing the new EU rapid deployment force, designed to implement Petersberg tasks).

of military intervention—must remain an opportunity for *pacigérance* rather than an *a priori* obligation.³⁷⁴ Unfortunately, as I have noted earlier, there is as yet no sensible distinction to be drawn between traditional peacekeeping and peace enforcement. A crisis management capability that is based on solidarity, humanitarianism, and enlightened self-interest, and that stakes out a boundary between crisis intervention and militarist adventures, represents the best practice for a reformed, activist neutrality.³⁷⁵

E. *A Final Thought on the New Neutrality*

Commentators will not be slow to perceive—or to reproach—the powerful change of emphasis from traditional permanent neutrality that this reformed neutralization will herald. One can expect to hear repetition of the now infamous comment of President Clinton's campaign advisor Michael Mandelbaum that foreign policy should not become merely "a branch of social work."³⁷⁶ I previously noted Swiss jurist Daniel Frei's opinion that no adequate substitute for the "precision" of the classical notion of neutrality—and of the derived secondary norms of permanent neutrality—has yet been devised.³⁷⁷ Edgar Bonjour, the great historian of Swiss neutrality, concluded a 1980 essay on Austrian and Swiss permanent neutrality with an almost mocking suggestion of how a new activist neutrality might be integrated into classical theory:

³⁷⁴ There remains, however, the logical quandary of a separate enforcement action under U.N. mandate. If an EU member state were attacked, and the neutralized EU members remained outside the conflict, would the Security Council not then mandate action to restore the territorial integrity of the attacked state—and require the participation of the neutrals in any event? This is precisely why participation in the United Nations is incompatible with the notion of abstention from military alliances. In its plenary operation, the United Nations is a military alliance, except that its mutual assistance commitments are relayed through a cumbersome bureaucratic apparatus. Unfortunately, the legal legerdemain of assistance treaties, and the providential geopolitics of stalemate, kept neutralized states complacent about U.N. membership until the end of the Cold War. See *supra* note 218 (discussing conditionality of assistance treaties).

³⁷⁵ Admittedly, one can expect skepticism about a positive, active neutrality, as though these expressions were mere camouflage for the inner moral vacuity of the position, its moral indifference to the suffering of other countries and peoples. But those are issues best treated in another place, not in the framework of a juristic study. See ZIEGLER, *supra* note 3, at 168 (noting embrace of "positive" neutrality by Swiss political and business oligarchies).

³⁷⁶ Mandelbaum, in fact, was criticizing the open-ended nature of potential humanitarian interventions, which were likely to result in "deep, protracted, and costly engagement in the tangled political life of each country." Michael Mandelbaum, *Foreign Policy as Social Work*, 75 FOREIGN AFF. 16, 18 (1996).

³⁷⁷ See *supra* note 9.

When the Austrian Foreign Minister sees in neutrality a 'duty to [conduct] a constructive foreign policy,' which allegedly suits Austria's interests, but which also 'takes account in the presentation of its goals of the justifiable interests of other states in a balanced European and global policy,' that definition smacks almost of a renunciation of the conventional international law neutrality principle of impartiality, and sounds like partisanship in the cause of peace, like an obligation to strengthen peace in the Community of States³⁷⁸

But partisanship in the cause of peace is precisely what a reformed neutralization will engender. This new conceptualization offers a transition, in other words, from a traditionalist, isolationist preoccupation with the inevitability of war and the need for a credible armed neutrality to an activism that self-consciously seeks to protect the state of peace, and that commits its adherents to specific strategies, both passive and active, toward that end.

VI. CONCLUSION

The future of permanent neutrality, like its past, will be tied to the vitality of state sovereignty, and therefore indeed to the future development of international law itself. If the present trend toward interdependence among states continues, and if political animosities are increasingly sublimated through powerful supranational institutions, then conceivably the need for classical or permanent neutrality, or even for the reformulated code presented here, will truly wither away. That Marxist outcome would not, in fact, necessarily disturb the states which have chosen permanent neutrality. If the ultimate purpose of adopting a neutralized status is to safeguard national security,³⁷⁹ then the means used to assure that end need not be an unswerving addiction to the nostrums of neutrality.³⁸⁰ Only a decade after the end of the Cold War, however, it would be wrong to subvert the entire law of neutrality as an irrelevancy. Indeed, it is quite possible that the current international state of affairs is a temporary reflex consequence of the fall of Soviet power, and that there may be an eventual resuscitation of interstate ideological and political rivalry.³⁸¹ And writing at the close of the Clinton period of international politics, a

³⁷⁸ Bonjour, *supra* note 24, at 838.

³⁷⁹ This is true also in the context of a reformed permanent neutrality that seeks to promote the state of peace.

³⁸⁰ After all, concept slippage has intensified since the end of the Cold War. Public opinion among the neutral states has become less specific in its understanding of the idea of neutrality, which can range from the simple aspect of not taking part in wars to a cipher for national sovereignty. See Steve Pagani, *Austria's Neutrality Is Obsolete, Defence Minister Says*, REUTER TEXTLINE, Nov. 9, 1993 (on file with author).

³⁸¹ Hoffman asks the same question, speculating whether the "present anomie" might be

diminution in the number of international and domestic flashpoints cannot easily be predicted. Time has not altered the validity of the concluding prediction in Denise Robert's 1950 exposition of Swiss neutrality, that as long as there exists a certain number of sovereign political entities, the option of neutrality in some form must remain.³⁸²

The science of international law, which almost always follows rather than leads the practice of states, accordingly will continue to comprehend institutions based on some mix of attributes derived from classical and permanent neutrality. What is required now is an updating of that whole conspectus of law to take account of the normative weaknesses of the law of war, and of the need for neutralized states to have the flexibility to treat participation in collective security actions as a legitimate element of a new primary duty to pursue and maintain peace.

explained as a "post-cold war [*sic*] withdrawal fling by the United States, a transitional muddle and turmoil in Russia, the tail end of Maoism combined with the beginning of capitalism in China, [or] a gradual shift in Japan and Europe from merely 'civilian' toward all forms of power." HOFFMAN, *supra* note 10, at 155. The system, in other words, could in the future be multipolar, or even bipolar, or an array of regional powers dominating regional subsystems. *See id.*

³⁸² *See* ROBERT, *supra* note 25, at 92.